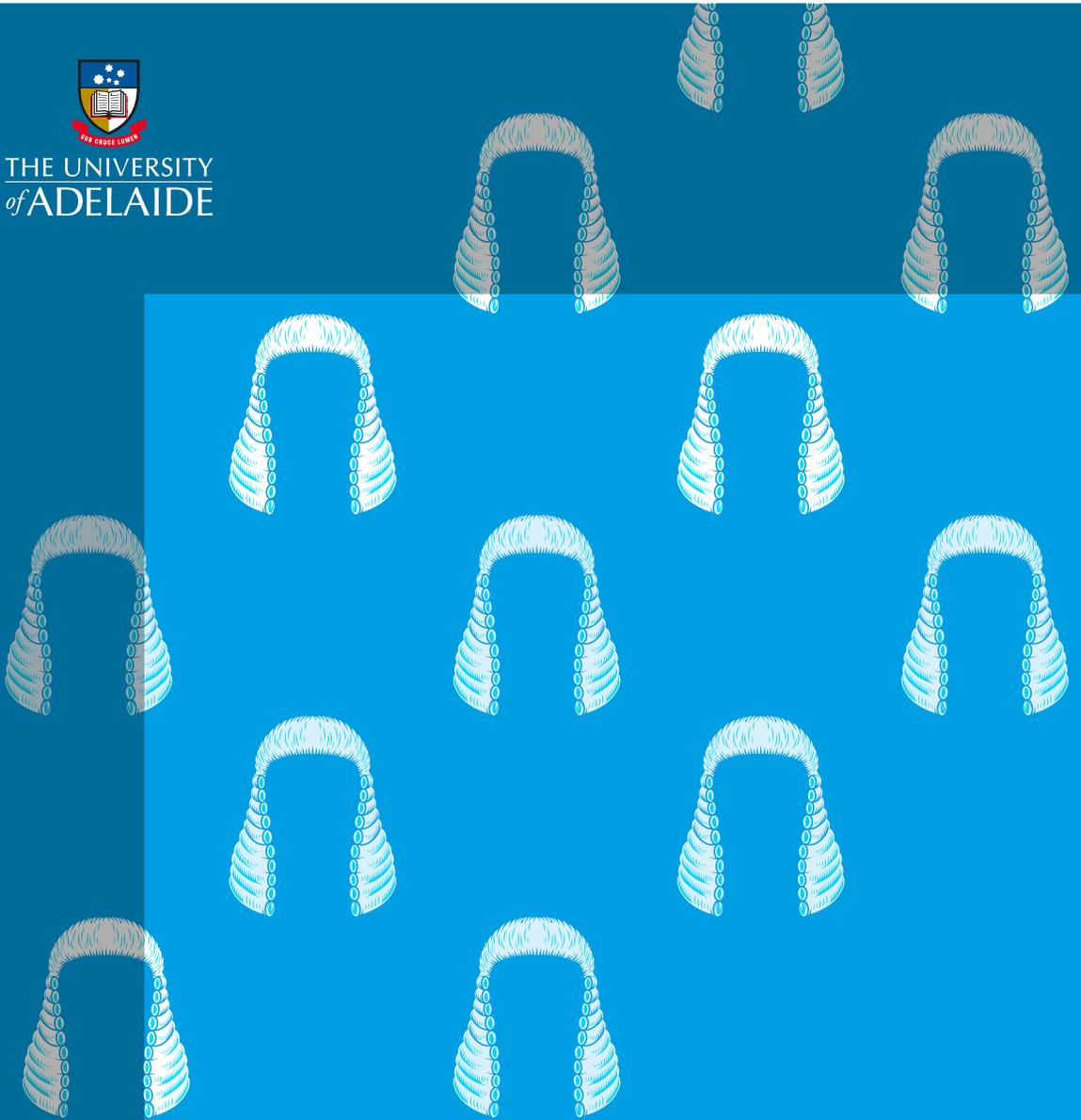




THE UNIVERSITY  
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Volume 40, Number 3

# THE ADELAIDE LAW REVIEW

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# Adelaide Law Review

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*Stephen Gageler\**

## A TALE OF TWO SHIPS: THE MV *TAMPA* AND THE SS *AFGHAN*

### ABSTRACT

This article tells the tale of two events of constitutional significance: the arrival in 1888 of steamer the SS *Afghan* into Sydney Harbour and the entry in 2001 of Norwegian containership the MV *Tampa* into Australian territorial waters. More than 100 years apart, these incidents raised parallel issues about the scope of the executive power to control entry into Australia and the role of courts in the formulation and implementation of migration policy.

### I INTRODUCTION

The international movement of people has become in the second decade of the 21<sup>st</sup> century a source of increasing tension between nations and within groupings of nations. It has also become a source of increasing tension within nations between national institutions. Disagreement within and between politically accountable branches of government over the formulation of migration policy has been accompanied in a number of countries by conflict between politically accountable branches of government and judicial branches of government over the implementation of migration policy. Migration litigation has emerged as a battleground in which courts and executives have at times been the principal adversaries.

Although it is a distinction the merits of which remain controversial, the fact is that Australia has been at the forefront of the recent global move to tighten restrictions on the entry of foreign nationals. Here, as elsewhere, conflicts over the implementation of migration policy have manifested in institutional conflicts which have played out in the courts.

My intention in this article is to draw some parallels between some events of national constitutional significance in Australia in the early part of the 21<sup>st</sup> century and some events of colonial constitutional significance in New South Wales in the late part

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\* Justice of the High Court of Australia. This is an edited version of a speech, versions of which were given as the Sir James Martin Oration delivered at the Lysicrates Foundation Annual Dinner, at the premises of Gilbert + Tobin in Sydney on 27 August 2018, and as an Australian Academy of Law Public Lecture, delivered at the University of Adelaide Law School on 28 February 2019. My thanks to Hannah Canham for her research and assistance in preparing the speech for publication.

of the 19<sup>th</sup> century. The tale I want to tell is of two ships: the container ship, the MV *Tampa*, and the steamer, the SS *Afghan*.

## II THE MV *TAMPA*

Without descending into the accompanying political controversy, let me revisit the basic facts of the *Tampa* crisis of 2001. On 26 August 2001, Captain Rinnan, Master of the Norwegian container ship the MV *Tampa*, received a request from the Australian Coast Guard to rescue a vessel in distress. Australian authorities guided Captain Rinnan to the wooden fishing boat sinking in international waters near Christmas Island. Licensed to carry no more than 50 people and with a crew of 27 already on board, the MV *Tampa* proceeded to rescue 433 people. On 29 August, Captain Rinnan was concerned that some of those rescued required urgent medical treatment. He took his ship into Australian territorial waters about four nautical miles off Christmas Island. The Administrator of Christmas Island, acting on instructions from the Cabinet Office, declined to permit the rescuees to land on Christmas Island and, within hours, 45 members of the Special Air Services Regiment of the Australian Defence Force left Christmas Island and boarded the MV *Tampa*.

In proceedings commenced on behalf of the rescuees in the Federal Court of Australia on 31 August 2001, the primary judge, North J, found that the rescuees were detained on board the MV *Tampa* by acts of the Australian Government for which there was no lawful authority and that an order in the nature of habeas corpus was justified.<sup>1</sup> Amongst the arguments put on behalf of the Australian Government by the Solicitor-General, David Bennett QC, which North J rejected, was an argument that the rescuees were not detained because they had boarded the MV *Tampa* voluntarily and were free to go anywhere except Australia. Another argument was that, as foreign nationals lacking any entitlement to enter Australia, their expulsion and incidental detention was a lawful exercise of the executive power of the Commonwealth without need of statutory support.

The judgment of North J was delivered in a camera-packed courtroom on 11 September 2001 — or, as we have become accustomed to referring to that day, ‘9/11’. An appeal by the Australian Government to the Full Court of the Federal Court was heard two days later.

On 18 September the Full Court, by majority, allowed the appeal and set aside the orders which had been made by North J.<sup>2</sup> The majority comprised French and Beaumont JJ. Chief Justice Black dissented. The difference between the judges who comprised the majority and the minority was that French and Beaumont JJ accepted, and Black CJ rejected, the primary arguments of the Australian Government — both

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<sup>1</sup> *Victorian Council for Civil Liberties Inc v Minister for Immigration and Multicultural Affairs* (2001) 110 FCR 452.

<sup>2</sup> *Ruddock v Vadarlis* (2001) 110 FCR 491 (*‘Tampa case’*).

that the rescuees were not detained, and that the executive power of the Commonwealth in any event permitted their detention for the purpose of expulsion.

An application for special leave to appeal to the High Court was lodged, but by the time that application came to be heard the rescuees (or most of them) had been taken to Nauru where it appears to have been accepted that their detention, if any, in the purported exercise of the executive power of the Commonwealth had ceased. In legislation which had passed both Houses and received the Governor-General's assent on the same day — 27 September 2011 — the Commonwealth Parliament had also enacted the *Border Protection (Validation and Enforcement Powers) Act 2001* (Cth), providing that all action taken by or on behalf of the Australian Government in relation to the MV *Tampa* was to be taken for all purposes to have been lawful when it occurred, and that proceedings, whether civil or criminal, were not to be instituted or continued in any court in respect of that action. Special leave to appeal was refused on 27 November 2001.<sup>3</sup>

In 2015, the High Court had occasion to revisit the question of the scope of the executive power of the Commonwealth which had divided the Full Court of the Federal Court in the *Tampa case* in the context of considering the lawfulness of actions taken by Australian maritime officers on the command of the National Security Committee of Cabinet to intercept an Indian-flagged vessel in the contiguous zone off Christmas Island and to transport its 156 passengers who claimed to be Tamil refugees to India.<sup>4</sup> The High Court held by a majority of four to three that the actions were authorised by statute. The three members of the minority took the view that the actions were not authorised by statute and that the majority in the Full Court of the Federal Court had been wrong in the *Tampa case* to hold that the executive power of the Commonwealth extended to permit expulsion and incidental detention of foreign nationals having no entitlement to enter Australia. As one of the majority who held that the actions in issue were authorised by statute, I expressed no view then on the question of the scope of the executive power of the Commonwealth, and I am not about to do so now.

What I want to do is to tell how a similar question of the scope of the executive power capable of being exercised by the Colonial Government of New South Wales came up and was answered by the Supreme Court of New South Wales in May and June 1888.<sup>5</sup>

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<sup>3</sup> Transcript of Proceedings, *Vadarlis v Minister for Immigration and Multicultural Affairs* (High Court of Australia, M93/2001, Gaudron, Gummow and Hayne JJ, 27 November 2001).

<sup>4</sup> *CPCF v Minister for Immigration and Border Protection* (2015) 255 CLR 514.

<sup>5</sup> See generally JM Bennett, *Colonial Law Lords: The Judiciary and the Beginning of Responsible Government in New South Wales* (Federation Press, 2006) 27–43; Eric C Rolls, *Sojourners: The Epic Story of China's Centuries-Old Relationship with Australia* (University of Sydney Press, 1992) 455–508.

### III THE SS *AFGHAN*

#### A *The Colonial Setting*

To introduce some of the principal protagonists in the story, Sir James Martin, who had been the first Australian born Premier of New South Wales and who had gone on to hold the position of Chief Justice of New South Wales for 13 years, had died in office at the beginning of November 1886. Julian Salomons QC had been appointed as Martin's successor but had resigned before being sworn in.<sup>6</sup> Salomons resigned after calling on Windeyer J who, according to the *Australian Dictionary of Biography*, 'taunted him with being unacceptable and accused him of "always breaking down mentally"'.<sup>7</sup> Salomons decided that his 'temperament would not bear ... the strain and irritation that would be caused by unfriendly relations'.<sup>8</sup>

Following the resignation of Salomons, Sir Frederick Darley had been persuaded at the urging of the then Premier Sir Patrick Jennings that it was his public duty to take the position.<sup>9</sup> Jennings had resigned in January 1887, immediately after which Martin's earlier great political rival, Sir Henry Parkes, had formed his fourth ministry and gone to an election at which he had won a resounding victory.

The geo-political setting for the story is well explained in a monograph by Benjamin Mountford entitled *Britain, China, & Colonial Australia*.<sup>10</sup> For the purpose of my story, it is sufficient to note that, amid rising popular concern, an inter-colonial conference in 1880 and 1881 had resulted in agreement in principle by the Governments of the Australian colonies to the enactment of uniform laws restricting Chinese immigration.<sup>11</sup>

The legislation which implemented that agreement in New South Wales was the *Influx of Chinese Restriction Act 1881* (NSW), the object of which was declared in its preamble to be to regulate and restrict the immigration of Chinese persons into New South Wales. The Act required the master of every vessel on arrival at a port in New South Wales to provide customs officers with a list of the names, ages and ordinary places of residence of all Chinese persons on board<sup>12</sup> and, with certain

<sup>6</sup> JM Bennett, *Sir Frederick Darley: Sixth Chief Justice of New South Wales* (Federation Press, 2016) 113–41 ('*Sir Frederick Darley*').

<sup>7</sup> Suzanne Edgar and Bede Nairn, 'Salomons, Sir Julian Emanuel (1835-1909)' in Douglas Pike, Geoffrey Serle, Russel Ward (eds), *Australian Dictionary of Biography* (Melbourne University Press, 1976) vol 6, 81–2.

<sup>8</sup> *Ibid.*

<sup>9</sup> Bennett, *Sir Frederick Darley* (n 6) 144–5.

<sup>10</sup> Benjamin Mountford, *Britain, China, & Colonial Australia* (Oxford University Press, 2016).

<sup>11</sup> AW Martin, *Henry Parkes: A Biography* (Melbourne University Press, 1980) 315–6; Intercolonial Conference, *Minutes of Proceedings of the Intercolonial Conference Held at Sydney, January, 1881* (Thomas Richards, Government Printer, 1881) 9.

<sup>12</sup> *Influx of Chinese Restriction Act 1881* (NSW) s 2.

exceptions, made it an offence for the master to have on the vessel more than one Chinese passenger for every hundred tons of the tonnage of the vessel.<sup>13</sup> The Act also required the master of every vessel arriving at every port in New South Wales to pay a poll tax of £10 for every Chinese person carried on the vessel before that person would be permitted to land.<sup>14</sup> There was an exemption from the poll tax for those Chinese persons who were British subjects.<sup>15</sup> And there was another exemption for those Chinese persons who had been living in the Colony and who had obtained a certificate from the Colonial Treasurer authorising their temporary departure.<sup>16</sup>

Despite the *Influx of Chinese Restriction Act 1881* (NSW) and similar legislation in South Australia, Victoria and Queensland<sup>17</sup> a stream of Chinese immigration continued into the colonies and, with it, popular concern continued to rise. By 1888, the centenary of the arrival of the First Fleet, the vast majority of the European population in those colonies was concerned about the prospect of being swamped by Chinese immigration and suspicion was growing that the Chinese empire of the Qing Dynasty had territorial designs on Australia itself. This was leading to tension between the nascent governments of the colonies, whose anti-immigration attitudes reflected the sentiments of their local constituencies, and the Colonial Office in London, which sought to keep open the free movement of people and goods between Australia and Hong Kong and to maintain a policy of greater engagement with Asia.

At a raucous meeting at Sydney Town Hall at the end of March 1888, the future Prime Minister, Edmond Barton, ‘moved a unanimous motion that “the almost unrestricted influx of Chinese persons into Australia” was a threat to political and social welfare’.<sup>18</sup> Three days later, Parkes dispatched a telegram to the Colonial Secretary, Lord Carrington, stating that ‘Australian feeling [was] much exercised in reference to Chinese immigration’ and that the ‘difficulty’ was threatening to become a ‘calamity’.<sup>19</sup>

### B *Arrival of the SS Afghan in Sydney Harbour*

So it was that in May 1888, four ships carrying Chinese passengers arrived in Sydney Harbour at more or less the same time. One of those ships was the *SS Afghan* measuring 1,438 tons under the command of Captain Roy. On the *SS Afghan* were 268 Chinese passengers who had boarded in Hong Kong.<sup>20</sup> One of them was Lo Pak, also known as Ah Buck. Lo Pak had been living in New South Wales. He had obtained

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<sup>13</sup> Ibid s 3.

<sup>14</sup> Ibid s 4.

<sup>15</sup> Ibid s 10.

<sup>16</sup> Ibid s 9.

<sup>17</sup> *Chinese Immigrants Regulation Act 1877* (Qld); *Chinese Immigrants Regulation Act 1881* (SA); *Chinese Act 1881* (Vic).

<sup>18</sup> Mountford (n 10) 101.

<sup>19</sup> Ibid 102.

<sup>20</sup> ‘Arrival of a Shipload of Chinese’, *The Argus* (Melbourne, 28 April 1888) 13.

a certificate from the Colonial Treasurer authorising his temporary departure, and he was now returning.

The arrival of the ships in Sydney Harbour was met with alarm amongst the local population. People turned out in the streets and on the wharves of Sydney to protest against the arrival and an estimated 5,000 protesters marched on Parliament House. Parkes formed the view that there would be violence and possibly bloodshed if any of the Chinese passengers were to land. Parkes guaranteed to the assembled crowd that none of them would land and instructed the New South Wales Police to prevent them from doing so. Police under the command of Inspector Hyem were placed on board the vessels and on the wharf where they formed a cordon.<sup>21</sup>

### C *The Case of Lo Pak*

Lo Pak, unable to disembark, sought a writ of habeas corpus from the Supreme Court.<sup>22</sup> Chief Justice Darley, thinking Lo Pak had an arguable case, on 14 May 1888 made a rule nisi the procedural effect of which was to oblige Inspector Hyem to show cause before the Full Court why his action was lawful in order for the rule not to be made absolute. Inspector Hyem sought to meet that obligation by filing an affidavit which relevantly said no more than that he was acting through the Inspector-General of Police under the authority and by orders of the Government of the Colony. Before the Full Court comprised of Darley CJ and Windeyer and Foster JJ, on 17 May, Inspector Hyem was represented by Salomons.

Salomons presented what were in effect three arguments as to why the rule nisi for habeas corpus should not be made absolute but instead should be discharged. The argument which received the shortest of shrift from the Full Court was that an alien had no right at all to approach the Supreme Court for a writ of habeas to prevent him from being dealt with in what Salomons sought to characterise as an exercise of sovereign power. The other two arguments might have come from the script in the *Tampa case*. One was that Lo Pak was not detained on board the SS *Afghan* because he had embarked on the vessel of his own volition and because he remained free to disembark anywhere in the world except in New South Wales. The other was that the Government of New South Wales had executive power to expel or repel an alien at will.

The Supreme Court gave judgment on the spot. Whether the Queen of England might have power by proclamation to prevent aliens from entering the kingdom, the Supreme Court held, was unnecessary to answer. What was abundantly clear was that the Colonial Government had no such power. Inspector Hyem's affidavit, deposing simply to him acting on the authority of the Government of the Colony, was not a sufficient return to a rule nisi for habeas corpus, and 'no man's liberty', to quote the words of Darley CJ, 'whether he be a subject of the Queen, or the subject of any other

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<sup>21</sup> Henry Parkes, *Fifty Years in the Making of Australian History* (Books for Libraries Press, 1892) vol 2, 205.

<sup>22</sup> *Ex parte Lo Pak* (1888) 9 LR (NSW) 221, 221 ('*Lo Pak*').

nation at peace with England ... would be safe for one moment were it held that this was a sufficient return'.<sup>23</sup> 'This might be a good return in an autocratic State like Russia', Foster J said, 'but in a country governed by free institutions it cannot be for a moment listened to, since nothing is more inconsistent with freedom than that a people should be arbitrarily subjected to the will of the executive'.<sup>24</sup>

Parkes was furious at the decision in *Lo Pak* and was determined to maintain the Government line. The morning after the decision, Chinese passengers on the SS *Afghan* and on another ship who, like *Lo Pak*, held certificates of exemption, were allowed to disembark. But no one else. '[T]here is one law which overrides all others', Parkes declared in the Legislative Assembly, 'and that is the law of preserving the peace and welfare of civil society'.<sup>25</sup>

#### D *A Victorian Interlude: The Case of Chung Teong Toy*

Before it had arrived in Sydney, the SS *Afghan* had in April steamed to Melbourne. There an attempt by Chung Teong Toy to disembark had been thwarted when the Victorian Collector of Customs, Alexander Musgrove, acting on the instructions of the Minister within the Government of Victoria responsible for customs and trade, refused to receive the poll tax of £10 which Captain Roy had tendered in order for him to be permitted to land under the *Chinese Act 1881* (Vic). The refusal eventually resulted in a case framed as an action for damages which came to be heard before the Full Court of the Supreme Court of Victoria at a more leisurely pace. *Toy v Musgrove* was to be argued over a period of four days in July and was to result in judgment given in September.<sup>26</sup> The Supreme Court of Victoria would in its judgment in September reach by majority the same conclusion: that the Colonial Government lacked executive power to expel or repel an alien at will. The Victorian Government would then appeal the decision to the Privy Council which, in London in 1891, after a heavy argument which extended over three days and reserving its decision for four months, would manage to dispose of the appeal on technical grounds without reaching the issue of constitutional principle.<sup>27</sup> Because he had carried 268 Chinese passengers on a vessel measuring 1,439 tons, Captain Roy had been guilty of the offence of bringing a greater number of Chinese persons into port than was allowed. Because Captain Roy had been guilty of that offence, the Privy Council held Musgrove was under no obligation to accept a payment tendered by Captain Roy on behalf of any one of those passengers. Moreover, intimated the Privy Council, in circumstances where Chung Teong Toy made no claim to have been wrongfully imprisoned, his action for damages could only be maintained if he could establish that he had a legally enforceable right to enter Victoria. There was no authority for the proposition that an alien had such a right at common law. Their Lordships therefore did not

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<sup>23</sup> Ibid 235.

<sup>24</sup> Ibid 248.

<sup>25</sup> Parkes (n 21) 212.

<sup>26</sup> *Toy v Musgrove* (1888) 14 VLR 349.

<sup>27</sup> *Musgrove v Toy* [1891] AC 272.

think it appropriate to express any opinion on the question of the scope of colonial executive power on which the Supreme Court of Victoria had divided.

Our story, however, continues in Sydney in May 1888.

### E *The Case of Leong Kum*

Five days after the Full Court of the Supreme Court of New South Wales decided the case of *Lo Pak*, Darley CJ made another rule nisi for habeas corpus this time in the case of *Leong Kum*.<sup>28</sup> Like *Lo Pak*, Leong Kum was a Chinese subject, but unlike *Lo Pak*, he had never before lived in New South Wales. When he arrived in Sydney Harbour on the SS *Menmuir*, the captain of that ship tendered the poll tax for Leong Kum, which James Powell, the New South Wales Collector of Customs, refused to receive. Meanwhile Inspector Hyem and his men, acting under the continuing instruction of Parkes, continued to form the cordon which prevented Leong Kum from leaving the ship.

Being obliged to show cause why Leong Kum should not be released from the SS *Menmuir*, Powell filed an affidavit in which he deposed that Leong Kum was free to leave the Colony and was in no way restricted in his liberty except insofar as he was by order and under the authority of the Government of the Colony prevented from disembarking from the vessel and so becoming a resident of the Colony. Before the Full Court constituted by Darley CJ and Windeyer and Innes JJ, Powell was on 23 May 1888 represented by Salomons.

Salomons might or might not have been able to take the same technical point that was ultimately to prevail in the Privy Council in *Musgrove v Toy* three years later. The tonnage of the SS *Menmuir* and the number of Chinese passengers on board does not appear from the report of the case of *Leong Kum*. If it had been open to Salomons to argue that Powell was under no obligation to accept a payment tendered because the captain of the SS *Menmuir* was guilty of the offence of bringing a greater number of Chinese persons into port than was allowed, the argument evidently did not occur to him or to anyone else involved in defending the case. It was a very technical argument, and the Supreme Court of New South Wales was no place for a faint-hearted barrister to take a very technical point.

What Salomons did in the case of *Leong Kum* was bravely present the same argument he had presented the week before in the case of *Lo Pak*. Unsurprisingly, he got a hostile reception. Bernhard Wise, who appeared for Leong Kum, was stopped in argument. The Supreme Court again gave judgment on the spot. The case raised no issue that had not been decided the week before, Darley CJ opined, and the views he had then expressed he now held with even greater conviction.<sup>29</sup> The Chinese persons who were on ships in Sydney Harbour, said Innes J — who had not participated in the previous case — were as much within New South Wales as if they were in George

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<sup>28</sup> *Ex parte Leong Kum* (1888) 9 LR (NSW) 250 ('*Leong Kum*').

<sup>29</sup> *Ibid* 255.

Street. Being within New South Wales, they were entitled to the protection of its laws, not least of which was the right to personal liberty. They were deprived of that right for so long as they were forcibly imprisoned on a ship.<sup>30</sup>

#### F *The Case of Woo Tin*

After the case of *Leong Kum* finally came the factually identical case of *Woo Tin*.<sup>31</sup> It was heard by an identically constituted Full Court on 5 June 1888. The government party was again represented by Salomons, who this time submitted to the judgment of the Court. In layman's terms, Salomons 'skied the towel'.

The judgment of the Supreme Court which Darley CJ delivered that day in the case of *Woo Tin* has been fairly described by Keith Mason QC (the former Solicitor-General of New South Wales and former President of the Court of Appeal of the Supreme Court of New South Wales) as 'a very fine piece of sustained judicial rhetoric';<sup>32</sup> perhaps it was the strongest in Australian history. To borrow the words of Darley's biographer, Dr John Michael Bennett, this last of the 'Chinese Cases' saw Darley's 'fearlessness' as a jurist at its 'zenith'.<sup>33</sup>

The body of Darley CJ's judgment for the Supreme Court in *Woo Tin* consists of a series of lengthy quotes from judgments of Martin CJ. Worthy of being set out in full is Darley CJ's introduction, one of his quotes from then Martin CJ and then his conclusion.

Chief Justice Darley started as follows:

This is now the third time that the power of this Court has been invoked to grant writs of *habeas corpus* to release persons who, coming within the provisions of the *Chinese Influx Restriction Act*, have had tendered for them the poll-tax which is required by that Act. Upon the second application we pointed out that we had already declared what the law of the colony upon this subject is, and further, that everyone in this colony, no matter how high his position, or how low, was bound by that declaration, and bound to scrupulously obey the law as declared. Now, we find that the law so enunciated by us, is for the second time knowingly and of purpose disregarded and set at nought, and this too by those who, above all others in this community, are by their prominent position, by the duty they owe their country, and by their oath of allegiance to their Sovereign, bound to see that the law of their country as pronounced by the properly constituted authorities (the Judges of the land), is duly and faithfully carried into execution. The constitution of our country does not provide the Judges with a separate staff of officers for the

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<sup>30</sup> Ibid 268–9.

<sup>31</sup> *Ex parte Woo Tin* (1888) 9 LR (NSW) 493 ('*Woo Tin*').

<sup>32</sup> Keith Mason, *Lawyers Then and Now: An Australian Legal Miscellany* (Federation Press, 2012) 187. See also Keith Mason, *Old Law, New Law: A Second Australian Legal Miscellany* (Federation Press, 2014) 133–6.

<sup>33</sup> Bennett, *Sir Frederick Darley* (n 6) 267.

purpose of enforcing obedience to the decrees and judgments of the Court. The constitution casts this duty upon the executive, and never before in the history of any British community, so far as our knowledge extends, has this sacred duty been disregarded.<sup>34</sup>

Turning to precedent, Darley CJ then quoted the following from a judgment of Martin CJ given in a contempt case:

What are such Courts (that is the Supreme Courts) but the embodied force of the community whose rights they are appointed to protect? They are not associations of a few individuals, claiming on their own personal account special privileges and peculiar dignity by reason of their position. A Supreme Court like this, whatever may be thought of the separate members composing it, is the appointed and recognised tribunal for the maintenance of the collective authority of the entire community. The enforcement of all those rules which immemorial usage has sanctioned for the preservation of peace and order, and for the definition of rights between man and man, is entrusted to its keeping. Every new law made by the Legislature comes under its care, and relies upon it for its application. Without armed guards, or any ostentatious display — with nothing but its common law attendant, the sheriff, and its humble officials, the court-keepers and tipstiffs — it derives its force from the knowledge that it has the whole power of the community at its back. This is a power unseen, but efficacious and irresistible, and on its maintenance depends the security of the public.<sup>35</sup>

After references to a further judgment of Martin CJ<sup>36</sup> and an opinion of Wilmot J of the Court of King's Bench in 1758,<sup>37</sup> Darley CJ concluded as follows:

We did not, though this law was present to the minds of each and all of us, deem it expedient to bring it forward upon the second occasion when these matters were before us. Now, we are of opinion, in view of the exasperation which may be produced in the minds of those illegally imprisoned, that it is incumbent upon us to do so, in order to point out to those who take upon themselves the responsibility of acting illegally the great risk they run, for by doing so they place valuable lives in jeopardy in order that their illegal mandates may be carried out. The law is clear that a man illegally deprived of his liberty is justified in taking life if it is only by that means that he can obtain his liberty. Killing, under such circumstances, is not murder, but is justifiable homicide. In saying what we have said, we believe we are discharging our duty to the community. Were we to fail in this, or in pointing out the danger of pursuing such a course of illegality, we would be no longer worthy of the high position we have been appointed to fill;

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<sup>34</sup> *Woo Tin* (n 31) 493–4.

<sup>35</sup> *Ibid*, quoting *Re 'The Evening News' Newspaper* (1880) 1 LR (NSW) 211, 237.

<sup>36</sup> *Re the Echo and Sydney Morning Herald Newspapers* (1883) 4 LR (NSW) 237.

<sup>37</sup> *Opinion on the Writ of Habeas Corpus* (1758) Wilmot 77; 97 ER 29.

we would be regardless of the high trusts reposed in our hands. There must be a rule absolute made in each of these cases.<sup>38</sup>

‘Never before in the history of this colony has the executive government received such a rebuke’, exclaimed the *Herald* the following day, ‘[n]ever was a grave rebuke more thoroughly deserved’ and ‘[n]ever was judicial remark more fully justified’.<sup>39</sup> *The Bulletin*, which had earlier published a cartoon depicting Parkes in a tug-of-war with the Supreme Court, published another cartoon in which the judges were triumphant and Parkes was flat on his bottom.<sup>40</sup>

### G *The Aftermath*

Parkes had finally got the hint from the Supreme Court. But Parkes had also got the numbers in the Parliament.

Importantly, given that Parkes was also facing rising concern about his actions from within the Colonial Office in London, Parkes had got the backing of the South Australian Premier, Sir Thomas Playford. I mentioned that the arrival of the SS *Afghan* in Sydney Harbour was met with large protests. Similar protests had taken place in South Australia on 7 May 1888 when the SS *Menmuir* arrived in Port Adelaide on route to Sydney, where it would go on to feature in the case of *Lo Pak*. None of the Chinese passengers on board the SS *Menmuir* attempted to land in South Australia, and Playford made clear to a crowded public meeting at the town hall in Port Adelaide that none would ever be permitted to land.<sup>41</sup>

Two days later, Playford sent telegrams to Parkes and other colonial Premiers proposing an urgent inter-colonial conference to address what he referred to as ‘the Chinese question’. The conference proposed by Playford went ahead in Sydney between 12 and 14 June 1888. The result was a resolution, sponsored by Playford, expressing the opinion that the further restriction of Chinese immigration was ‘essential to the welfare of the people of Australia’ and that ‘the necessary restriction can best be secured through the diplomatic action of the mother country, and by uniform Australasian legislation’.<sup>42</sup> The conference worked its way through draft legislation which the governments of the colonies, with the exception of the governments of New South Wales and Western Australia, undertook to introduce into their respective Parliaments. New South Wales already had legislation before its Parliament which had temporarily stalled in the Legislative Council but which was about to be enacted.

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<sup>38</sup> *Woo Tin* (n 31) 496.

<sup>39</sup> *Sydney Morning Herald* (New South Wales, 6 June 1888) 9.

<sup>40</sup> Phil May, Illustration, *The Bulletin* 9(435) (Sydney, 2 June 1888) 10–11.

<sup>41</sup> ‘Arrival of the Menmuir at Adelaide’, *Daily Telegraph* (Sydney, 8 May 1888) 5.

<sup>42</sup> Legislative Assembly, Parliament of Victoria, *Chinese Immigration* (Parliamentary Paper No 20, July 1888).

On 11 July 1888, the New South Wales Governor assented to the *Chinese Restriction and Regulation Act 1888* (NSW). The Act, amongst other things, reduced the number of Chinese passengers able to be brought into a port from one for every hundred tons of the tonnage of a vessel to one for every three hundred tons, and it increased the poll tax from £10 to £100.<sup>43</sup> The Act was also expressed to ‘fully [indemnify]’ ‘[a]ll members of the Executive Government’ and all persons acting on their behalf who may have committed any act in preventing the landing of Chinese persons, or otherwise in relation to Chinese immigrants, or to vessels carrying such immigrants, since 1 May 1888.<sup>44</sup>

Just as the courtroom drama which would begin with the arrival of the MV *Tampa* off Christmas Island would end more than a century later, so ended the series of courtroom dramas which had begun with the arrival of the SS *Afghan* in Sydney Harbour in 1888 — with legislation.

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<sup>43</sup> *Chinese Restriction and Regulation Act 1888* (NSW) ss 5–6.

<sup>44</sup> *Ibid* s 2.

*Martin Hinton\**

## ANOTHER BAIL REVIEW

‘All stand.’

I check my agitation at the door to the courtroom before entering. I make my way to the centre of the bench, turn to the bar table, bow and sit.

I glance at the large flat screen fixed to the courtroom wall. There can be seen a small, skinny, twelve-year-old Aboriginal boy in a light blue polo shirt, sitting at a large table with his knees up, clutching them to his chest. Next to him sits a fifty-something, overweight, fair haired, white fella with glasses. The contrast is striking.

My associate calls the matter on; ‘In the matter of the Police and Thomas James’.

Appearances are taken. Thomas is represented by a lawyer from the Aboriginal Legal Rights Movement (‘ALRM’); the police by a prosecutor from the Office of the Director of Public Prosecutions. There is no-one else in the courtroom.

This is an application for the review of the decision of a Magistrate sitting in the Youth Court refusing to grant Thomas bail.<sup>1</sup>

In advance of the application I had read the supporting affidavits filed. They were the cause of my agitation. Thomas had been charged with two offences — property damage and breaching a bail agreement. The property damage was said to consist of his having kicked the door of a display vehicle at a car yard, denting it. At the time, Thomas was in the company of two mates, both youths, both Aboriginal, both a few years older than him and both having themselves damaged different cars in a similar manner. The offending was captured by the CCTV security system installed at the car yard.

A month before, Thomas had been arrested for the illegal use of a different car. He was, in fact, the passenger in a stolen car driven by a mate. That mate was one of the youths in whose company Thomas was one month later when he damaged the car at the car yard. Thomas had been bailed by the Youth Court on the condition that he not have contact with that mate. By associating with his mate on the occasion of committing the property damage offence for which he was now in court, Thomas had breached his bail agreement.

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\* Justice of the Supreme Court of South Australia; Adjunct Professor of Law, University of Adelaide; BA (Jur) (Adel); LLB (Hons) (Adel); LLM (Adel); LLM (LSE).

<sup>1</sup> *Bail Act 1985* (SA) s 14. Thomas James was not the applicant’s real name. I have changed it and all other names for the obvious reason.

It occurred to me that the charges were hardly the stuff that warrants the state keeping a 12-year-old boy in custody. I recalled the UN *Convention on the Rights of the Child* as saying somewhere, something, about the detention of a child being used only as a measure of last resort.<sup>2</sup> My gaze returned to the flat screen — he’s just a kid. Perhaps he is a bit of a handful, but still, locking him up seems extreme. I hope there is a good reason. I am conscious of the systematic racism and ethnocentrism that sadly is the broad experience of Aboriginal people. I am also reminded of the recent report of the Office of the Guardian for Children and Young People which states:

[T]he average rate of 10 to 17 year olds in detention per 10,000 young people in South Australia was 32.8 for Aboriginal compared with 0.8 for non-Aboriginal children and young people in 2017-18. This means that Aboriginal children and young people are 41 times more likely to be in detention than non-Aboriginal children and young people.<sup>3</sup>

The *Uluru Statement from the Heart* invades my thinking.

We are not an innately criminal people.<sup>4</sup>

I am tempted to launch into cross-examining the prosecutor.

I check my agitation.

The papers disclosed that Thomas was, in the old language, a ward of the State. Orders had been made some nine months ago that Thomas be placed in the care of the Chief Executive of the Department for Child Protection. Why that occurred, I did not know, but the Chief Executive had found him a ‘kinship placement’ with his aunt. My agitation is little soothed:

[In South Australia] of the 3,695 children and young people in out of home care at 30 June 2018, 33 per cent were Aboriginal.<sup>5</sup>

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<sup>2</sup> *Convention on the Rights of the Child*, opened for signature 20 November 1989, 1577 UNTS 3 (entered into force 2 September 1990) art 37(b). See also *United Nations Standard Minimum Rules for the Administration of Juvenile Justice (The Beijing Rules)* GA Res 40/33, UN Doc A/RES/40/33 (29 November 1985) r 17, 19–20.

<sup>3</sup> Office of the Guardian for Children and Young People & Training Centre Visitor, *Snapshot of South Australian Aboriginal Children and Young People in Care/and or Detention from the Report on Government Services 2019* (Report, April 2019) 7.

<sup>4</sup> Referendum Council, *Uluru Statement from the Heart* (Statement, 26 May 2017) <<https://www.referendumcouncil.org.au/final-report.html#toc-anchor-uluru-statement-from-the-heart>> (*‘Uluru Statement’*).

<sup>5</sup> Office of the Guardian for Children and Young People & Training Centre Visitor (n 3) 6.

And:

Research suggests that the relationship between the child protection system, juvenile justice and adult incarceration is so strong that child removal into out-of-home care and juvenile detention could be considered key drivers of adult incarceration.<sup>6</sup>

Further:

The rate of Aboriginal 0–17 year olds in out of home care per 1,000 children increased from 49.2 to 72.9 compared to 4.7 to 7 for non-Aboriginal 0–17 year olds between 2013–14 and 2017–18.<sup>7</sup>

The offending took place in Ceduna on South Australia's west coast where Thomas lived with his aunt. Since being remanded in custody, Thomas had been brought to Adelaide to be housed in the Youth Training Centre. Thomas had never been in custody before. Now he found himself the best part of 800 km from home. My gaze returned to the small boy on the screen. He must be anxious if not frightened, I thought. This whole experience cannot be positive. I hoped it was truly necessary.

I recalled the observations of the *Royal Commission into the Protection and Detention of Children in the Northern Territory*:

Children and young people also come into contact with the criminal justice system due to offending committed as a result of 'lack of maturity, the propensity to take risks and a susceptibility to peer influence, combined often with intellectual disability, mental illness and victimisation'. It is not unusual for children and young people to commit minor criminal offences, and most grow out of offending behaviour.

However, contact with the formal criminal justice system increases the likelihood that children and young people may reoffend in the future. Once a child or young person enters the criminal justice system, they may be labelled as an offender or criminal, which can affect their future behaviour. Punishment through detention may contribute to further engagement in criminal behaviour due to influence from 'deviant' peers, and they gain a criminal record which can limit their future prospects. There is also evidence that incarceration in a youth detention facility can 'interrupt and delay the normal pattern of "aging out" of criminal behaviour'.<sup>8</sup>

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<sup>6</sup> Australian Law Reform Commission, *Pathways to Justice — An Inquiry into the Incarceration Rate of Aboriginal People and Torres Strait Islander Peoples* (Report No 133, December 2017) 34.

<sup>7</sup> Office of the Guardian for Children and Young People & Training Centre Visitor (n 3) 6.

<sup>8</sup> *Royal Commission and Board of Inquiry into the Protection and Detention of Children in the Northern Territory* (Final Report, 2017) vol 2B, 210 (emphasis in original) (citations omitted).

The papers told me nothing of Thomas' immediate family, save that his mother was on parole. Was this another example of the frequent experience of Aboriginal people? A generation in custody and the next generation bereft of their love, support and nurturing. I do not mean to attribute blame here. The issues are large and complex, but the consequences for a 12-year-old Aboriginal boy are profound. The statistics betray the story. My mind travels to the Change the Record, Free to be Kids, National Action Plan:

There are many reasons why Aboriginal and Torres Strait Islander children are so over-imprisoned. The disadvantage experienced by many Aboriginal and Torres Strait Islander children means that, by no fault of their own, they are more likely to end up in prison. Further, research has pointed to bias by police against diverting or cautioning Aboriginal and Torres Strait Islander people, particularly children.

To give children the best chance to thrive, more needs to be done to support and strengthen families to stay together, keeping kids in their communities.<sup>9</sup>

Is that this case?

As he sat in the audio-visual suite at the Training Centre, I knew Thomas had a view of the bench and bar table. Not a friendly face in sight. Not an Aboriginal face in sight, just sombre looking non-Aboriginal lawyers in robes with books and papers talking about him.

I asked the gentleman sitting with Thomas for his name — Michael. I asked Michael his role. He performed a support function for children at the Training Centre. I know nothing of Michael's expertise or abilities, and I mean him no disrespect, but I wondered nonetheless why the state could not arrange for an Aboriginal support worker.

Counsel for Thomas stands to begin his submission. I interrupt before he can start. What's the Crown's attitude to the application? The prosecutor is caught off guard. She stumbles to her feet. 'The Crown acknowledges that the applicant has the benefit of the presumption of *doli incapax* and that custody should be the last place for a 12-year-old child ... but there is an unresolved legitimate concern about suitable accommodation.' I brushed aside the reference to *doli incapax*. It did not concern me immediately. I understood that the UN Committee on the Rights of the Child had determined that a minimum age for criminal responsibility of less than 12 was internationally unacceptable,<sup>10</sup> and had very recently urged Australia to increase the age

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<sup>9</sup> Change the Record, 'Free to be Kids, National Plan of Action' (Media Release, 27 November 2017) 1 <<https://changetherecord.org.au/blog/news/a-plan-to-transform-the-justice-system-for-aboriginal-and-torres-strait-islander-children>> (citations omitted).

<sup>10</sup> Committee on the Rights of the Child, *General Comment No 10: Children's Rights in Juvenile Justice*, 44th sess, UN Doc CRC/C/GC/10 (25 April 2005).

of criminal responsibility in this country,<sup>11</sup> but the presumption would likely feature little in my decision whether to grant Thomas bail. Gone are the days when charging a child and the presumption of criminal irresponsibility kept the child from receiving assistance.<sup>12</sup> We now know much more as a community and know, in particular, the importance of maintaining the family unit and the negative consequences of incarcerating children. Whatever one made of the power to prosecute 10–14 year-olds, bail for one so young should overwhelmingly be the norm.

What is the problem with finding Thomas suitable accommodation, I ask. The prosecutor has been in contact with the departmental caseworker responsible for Thomas. The caseworker has advised that the kinship placement previously available to Thomas is no longer available. In explaining further, the prosecutor tells me that the aunt with whom Thomas had been living had three children of her own and cared for two others in addition to Thomas, that Thomas had been ‘playing up’, affecting the behaviour of the other kids, and that the aunt no longer had the assistance of her partner in caring for the children on account of domestic violence issues requiring police attendance. In short, Thomas’ aunt could no longer care for him or control him. The prosecutor adds that Thomas’ aunt had asked for an alternate placement to be found for Thomas prior to his recent offending. The prosecutor continues: Thomas has not been attending school and has often stayed away from home until late at night.

I pipe up. ‘Where is the representative from the Office of the Chief Executive?’ The prosecutor looks perplexed. My agitation is revealed. I press on snappily, ‘If Thomas has been placed into the care of the Chief Executive of the Department of Child Protection, shouldn’t the Chief Executive or his or her representative be here? What is the Chief Executive doing to find Thomas suitable accommodation?’

The prosecutor advises that her information has been obtained from the caseworker appointed by the Chief Executive to deal with Thomas’ case. The caseworker is in Ceduna. The Department is doing all that it can to find Thomas a placement but it is unlikely anything will become available before he next appears in court.

Thomas is next due to appear in the Youth Court in 10 days’ time. I have no intention of leaving him in custody for 10 more days.

‘Do you know anything more about his family?’ I ask. Nothing. I am perplexed that the Crown cannot give me a complete run down on this boy’s family. Surely his caseworker has obtained details of his family. What was it that the Royal Commissioner into Aboriginal Deaths in Custody said, ‘The official record keepers saw all,

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<sup>11</sup> Committee on the Rights of the Child, *Concluding Observations on the Combined 5th and 6th Periodic Reports of Australia*, 82nd sess, UN Doc CRC/C/AUS/CO/5-6/ (27 September 2019).

<sup>12</sup> G Williams, ‘The Criminal Responsibility of Children’ [1954] *Criminal Law Review* 493.

recorded all, and rarely knew well or at all the people they wrote about'.<sup>13</sup> Perhaps it is simply a matter of questions not being asked. Perhaps the prosecutor does not see it as part of her role to provide the Court with possible bail options. I do not stay to debate the issue. I check my growing agitation. 'Do I understand you to say, if suitable accommodation can be found for Thomas, there is no objection to him being granted bail?' 'Yes', she says.

I turn immediately to defence counsel. What do you know about Thomas' family? He does not answer, rather he tells me that he arranged for an Aboriginal Liaison Officer attached to ALRM to visit Thomas' aunt and that, according to the liaison officer, she is happy for him to return to her care.

A quick volley of questions ascertains that the liaison officer has spoken to the very same aunt that asked Thomas' caseworker to place him somewhere else and does not want him back. The liaison officer is not in court. I pause to think. I am in no position to decide the factual dispute. Thomas' counsel tells me he has the aunt's phone number and that she is with ALRM's liaison officer as we speak, expecting the Court to call. I decline the invitation. It occurs to me that my telephoning the aunt may put her under considerable pressure, pressure she no doubt already feels to help her family. I also considered that it was highly unlikely that the caseworker's relayed report was without foundation. I needed to hear from Thomas' aunt and from his caseworker in person and yet, I did not want to delay things. I turn back to the bar table. 'Where are his parents?' The question is an open invitation to either counsel. The prosecutor has no information on Thomas' parents. Defence counsel says that Thomas' mother is somewhere in Adelaide, and so is his Nanna, but he does not have any contact details.

I turn to the flat screen. I ask Michael if he has any information that might assist. None, he says. The Department is in the process of arranging for an internal Aboriginal support worker to be assigned to Thomas who will liaise with his caseworker. That should occur within the next 24 hours. That is good, but I cannot wait.

I take matters into my own hands.

'Thomas, can you hear me?' 'Yep.'

'What's your Mum's name?' 'Michelle.'

'Do you know where she is?' 'No.'

'How long since you last lived with your Mum?' 'Dunno.'

'What year are you in at school?' 'Year seven.'

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<sup>13</sup> *Royal Commission into Aboriginal Deaths in Custody* (National Report, April 1991) vol 1, 5.

‘When you started year seven were you living with Mum?’ ‘No.’

‘What about when you were in year six, were you living with Mum when you were in year six?’ ‘I don’t know.’

‘What’s the names of your Nannas?’ ‘It was year six.’

‘What, you last lived with your Mum when you were in year six?’ ‘Yep.’

‘Tell me about your Nannas, what are their names?’ ‘There’s Nanna Tracey ... and Nanna Joyce’.

‘Do you know where Nanna Joyce lives?’ ‘No.’

‘What about Nanna Tracey?’ ‘She lives in Adelaide’.

‘Do you know where?’ ‘No.’

‘What about your Dad, what’s his name?’ ‘Jordan.’

‘Do you know where he is?’ ‘Nope. Locked up somewhere.’

I had recently had some involvement with the Office of the Guardian and knew that the Guardian had social workers frequently in and out of the Training Centre. I also knew that the Guardian had three or four Aboriginal social workers on staff. I was concerned that as he sat there, all Thomas heard was strange white people talking about him. Distantly I was also concerned that Thomas be exposed to a positive cultural influence as soon as possible. Sadly, the number of Aboriginal children in detention means that many become comfortable, particularly because they are often locked up with family. Detention becomes part of life for the family. It becomes the norm.

I wondered if the Guardian’s social workers had visited Thomas. I asked him.

‘Thomas have you met my mate Jim and his mate Brenton?’ ‘No.’

‘You sure? They’re a couple of Nunga fellas that come into the Centre to help kids out? You seen them?’ ‘Nup.’

‘Would it be ok if I get Jim, he’s a big bloke, and his mate Brenton to come and see you? Just to make sure you’re ok?’ ‘Yep’.

‘Just hang on a minute Thomas, I’m going to speak to the lawyers.’

I turn back to the bar table. It is now close to 11am. I tell counsel I will adjourn until 2pm. In the meantime I expect them both, working together, to do all they can to find Thomas’ mother and Nanna Tracey. If possible I want them both in court at 2. I also want to speak to the caseworker at 2; if there is any reason why Thomas cannot go

home with his Mum or Nanna, I want to know. I add that I will ring the Office of the Guardian and see if they can offer any assistance. I don't forget Michael; he is asked to provide whatever assistance he can to the lawyers to find Thomas' Mother and Nanna.

I turn back to Thomas and explain to him what I am going to do.

'I'm going to get Mum and Nanna Tracey here and see what we can do, ok?' 'Yep.'

'I'll see you after lunch, ok?' 'At 2!'

'Yes, that's right, at 2.'

He seems to understand.

I adjourn.

As I walk from the bench I glance one last time at the screen. The child's best interests are to be afforded paramountcy, I think to myself. That aspiration is no doubt correct, but as the system grinds away, all Thomas has heard in the police station, in the Magistrates Court and now here, is that he is a problem. Lots of people, all supposedly working in his interests, and all he hears is no-one wants him, and all he knows is that he is locked up like his mum and dad. How is it that the system so easily risks this becoming his norm?

My agitation simmers.

Contact is made with the Office of the Guardian. An Aboriginal social worker is immediately despatched to the Training Centre. I do not know what went wrong for Thomas and his family, but I wonder, would the outcome be different if the resources now being marshalled were available when problems first arose?

We resume promptly at 2pm. I make my way to the centre of the bench as my associate calls the matter back on. I notice there is an Aboriginal woman in court sitting in the gallery and no-one else. The audio-visual link is established. I watch as her face lights up when Thomas appears sitting next to Michael; hope, I think to myself.

I immediately ask defence counsel if it is Michelle or Nanna Tracey I see sitting in court. It is Michelle. First things first; I turn to the flat screen, 'Thomas can you see your Mum?' 'Nup.'

I ask Michelle to move to a position in the courtroom within the field of vision of the cameras. She does so.

'What about now?' 'Yep.'

Mum waves, smiling, and Thomas waves back. For the first time he looks interested.

I ask counsel if they have any objection to me speaking directly to Michelle. Neither counsel objects.

‘Is it Michelle?’ ‘Yes.’

‘Are you Thomas’ Mum?’ ‘Yes, your Honour.’

‘Can you tell me, do you have other children?’ ‘Yes, I have six children.’

‘And where are they?’ ‘Since I was locked up, two were placed with Tracey and the other four with my sisters in Ceduna.’

‘Are they your sisters in the Aboriginal way?’ ‘Yes, yep, you would call them cousins.’

‘How old are your children?’ ‘Thomas is the eldest.’

‘He’s the eldest!’ I butt in deliberately, ‘so he should be setting an example for the little ones!’ All said for Thomas’ benefit. His mother nods.

‘Tell me, where are you living?’ ‘I’m on parole and living at Port Adelaide.’

‘What are your plans?’ ‘When I finish parole, I want to get a house here in Adelaide and get my kids back.’

‘So you can’t have your kids on parole?’ ‘I’m in a hostel waiting for a house.’

‘Where’s your country?’ ‘West of Ceduna, near the border.’

‘You won’t go back?’ ‘My two little ones are in primary school here in Adelaide and they’re doing really well. I want them to keep going and the others as well.’

A dozen or so questions later and I had discovered that Michelle’s youngest had been placed with Nanna Tracey, that every day Michelle spent time with Tracey and her two youngest before returning each night to the hostel. She spoke quietly but respectfully. She had done time for assaulting her partner. Drink and domestic violence were a problem for them both, but she thought those days were behind her. They had been separated since before he was locked up. She did not think they would get back together. I am heartened and disheartened. I thank Michelle and let her know that I need to speak to the lawyers.

I then ask her, ‘Incidentally, when was the last time you spoke to your boy?’ ‘It’s been nine months,’ she says.

‘In a moment I will arrange for you to come and sit here in my seat and we will keep Thomas on the screen for five minutes so you can catch up, would that be ok?’ ‘Yes.’

Her smile is wide. Moments when a judge gets to feel that he or she has done a good thing are rare. This is one.

I turn to the lawyers. Clearly I cannot send Thomas home with his mother. ‘Any luck in finding Nanna Tracey?’ None yet. Nanna Tracey is clearly known to the Department; she already has two of Thomas’ siblings. Discussion ensues. It is resolved that the Court reconvene in the morning by which time it is hoped that Nanna Tracey is located and the Department will have had the opportunity to review her suitability as carer for Thomas.

I turn to Thomas. I explain to him that we haven’t been able to find his Nanna but we hope to do so overnight. I tell him I need him to stay one more night in the Centre. I ask him, is that ok? ‘Yep.’ I remind him of ‘my Nunga mates’ Jim and Brenton and tell him that they will drop in on him today sometime or get a friend to do so to make sure he is ok.

I then ask, ‘Would you like to speak to your Mum?’ ‘Yep.’

I formally adjourn to 10 am the following morning. As I get up I motion to Michelle to come forward and take my seat. I then make my way off the bench.

As the door to the ante-room closes I hear, ‘Hello my big man.’ ‘Hello Mum.’

A rare moment.

We reconvene at 10am the following morning. Everyone is in place, counsel, Thomas and Michael. Michelle is in the public gallery sitting next to another Aboriginal woman. My agitation is dissipating, but it is not gone.

Thomas had a criminal record. In 2017 as a 10 year old he had been dealt with at a Family Conference for two counts of being unlawfully on premises and two counts of damaging property. He attended a Family Conference again in 2018 for a series of offences committed between February and December of that year. Those offences included property damage and interfering with motor vehicles, in addition to numerous charges of breaching bail. This is not the place to assay the benefits or otherwise of family conferences, diversionary programs and specialist courts for youth and other vulnerable or unfortunate offenders, but a downside to these approaches is that those operating within the system may be less vigilant for injustice arising from charging practices because of the likely outcome associated with these alternative approaches. This is particularly concerning where, as in Thomas’ case, the youth has no watchful parent available to protect their interests. The Royal Commission observed:

The consequences [of] criminalising all breach of bail can be counterproductive. It criminalises conduct that is not, of itself, criminal, such as not residing at a prescribed address. It can also lead to the entrenchment of children and young people in the youth justice and detention systems if they are detained as a result. A child may be detained for breach of bail, and subsequently found not guilty of the original charge. The Commission understands that there is no evidence that making breach of bail a crime deters young people from offending. The Northern Territory Police has noted that it has not reduced offending.<sup>14</sup>

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<sup>14</sup> *Royal Commission and Board of Inquiry into the Protection and Detention of Children in the Northern Territory* (n 8) 293 (citations omitted).

I had no doubt that Thomas was old enough to understand and appreciate that he should not damage or interfere with another person's property. But I wondered whether he was able to appreciate, for example, the seriousness of the promise he made in entering a bail agreement. My agitation grew as I wondered what benefit or advantage to the community was to be gained from charging him a number of times with breaching bail. All such charges did was add to a list that would be available to be used against him later in life. Potentially used to justify greater and longer periods of detention whether on remand or upon sentence. A list that would paint a distorted picture of who he is, used without any real understanding of his story.

I turned to Nanna Tracey. She had had the two little ones since Michelle went into custody. They were doing well. I notice her smile as she tells me this with evident pride. She confirmed Michelle visited every day. She was Jordan's mother. She and Michelle got on well and she enjoyed having the little ones. She tells me without prompting that she has room for Thomas and will happily have him.

I ask her some more questions designed to satisfy myself that she has room, has time, has the energy and has the financial and familial support to take on a third grandchild.

'Thomas hasn't been going to school everyday ...' Before I can finish Tracey makes plain that if he lives with her, he will be going to school and there will be no mucking about.

'I can't have him upsetting his little brothers and sisters, he should set an example for them, do you think he will?' Again, all said for Thomas' benefit.

'He's a good boy, your Honour, and a good brother. It'll be alright.' It was the answer I had hoped he would hear.

I was impressed by Michelle and Nanna Tracey. They struck me as two warm, loving women, with their family's best interests at heart. Life had been difficult for them at times and there had been wrongdoing, but I felt they clearly loved and cared for the children.

I asked Nanna Tracey about Michelle's and Jordan's past. There had been trouble. Drink, no job, no money and there had been fighting. 'It was hard for the young ones, especially with six kids.' Jordan has 12 more months to serve. 'He's very sorry.' Michelle and Jordan have been apart for some time, since before he was locked up. I thank the ladies for coming to court.

The family's background probably went a long way to explaining Thomas' offending, I thought. The Change the Record 'National Action Plan' re-enters my thinking. Was it really necessary to charge Thomas with all those offences?

I turn back to the bar table. I am inclined to send Thomas home with Nanna Tracey. I ask the Prosecutor, 'have you been able to speak to Thomas' case worker?' 'Yes, the Chief Executive is happy for Thomas to be placed with his grandmother.' The Prosecutor adds, 'and the police have no objection.'

I turn back to Michelle and Tracey. ‘Ladies, do you have transport?’ ‘Yes, your Honour.’

‘I am going to release Thomas on bail to live with you Tracey.’ ‘Yes, your Honour.’

‘The Department may have other conditions that you will need to meet, is that ok?’ ‘Same as the other children, no problem.’

A few questions to Michael and I am able to tell Michelle and Tracey that they will be able to pick Thomas up from the Training Centre in an hour or so.

I turn to Thomas.

‘Thomas do you understand what’s happened?’ ‘Uh-huh.’

‘Your Mum and your Nanna are going to come and get you and you are going to live with your Nanna here in Adelaide. Is that ok?’ ‘Yep.’

‘Now we have to talk a bit about you annoying people and getting into trouble. Look at me.’

He looks up. ‘Why haven’t you been going to school?’ Silence. I wait. His gaze moves to his shoes.

‘Look at me.’ He looks up. ‘Can you tell me why you haven’t been going to school and why you’ve been getting into trouble?’ ‘Shame.’ He says it ever so quietly and looks down. I begin to feel out of my depth.

I take a punt. ‘No shame from Mum or Nanna?’ ‘No.’ Phew.

‘You live with your Nanna. You show those little ones what they have to do. Is your reading good?’ ‘Yep.’

‘And your writing?’ ‘Bit messy.’

‘You can fix that.’ ‘Yep.’

‘Do you promise me you’ll do your best to go to school and look after your brothers and sisters and your mum and Nanna?’ ‘Yep.’

‘Look at me. Promise?’ ‘Yep.’

‘Because courts and the Training Centre aren’t good for kids, are they?’ ‘No.’

‘And your brothers and sisters and your Mum and Nanna need you, ok.’ ‘Yep.’

‘So you’ll do your best?’ ‘Yep.’

‘Ok, it might take an hour or two, but your Mum and your Nanna are coming to pick you up.’

I turn to the bar table and ask counsel if there is anything I missed. The prosecutor seeks a no contact clause with Thomas’ co-accused. My agitation gets the better of me. ‘Forget it. He’s 12’, I bark. His bail agreement will contain no condition other than that he is required to live with his grandmother. The prosecutor senses there is no point in battling on.

I turn back to Michelle and Nanna Tracey. I wish them luck.

The Court is adjourned. As I walk from the bench my mind travels back to the *Uluru Statement from the Heart*:

Our children are alienated from their families at unprecedented rates. This cannot be because we have no love for them. And our youth languish in detention in obscene numbers. They should be our hope for the future.<sup>15</sup>

Today I am pleased for Thomas, but my agitation remains.

Perhaps that is a good thing.

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<sup>15</sup> *Uluru Statement* (n 4).



## WAIVER OF NATURAL JUSTICE

### ABSTRACT

The hearing rule and the rule against bias comprise the twin pillars of natural justice. There is a detailed body of case law about waiver of the bias rule but little about waiver of the hearing rule. This article examines the few cases dealing with waiver of the hearing rule. Attention is given to two decisions of intermediate courts — one from the Victorian Court of Appeal, the other from the Court of Appeal of England and Wales — which have examined waiver of natural justice in some detail. The article argues that waiver of the hearing rule should be possible because it can be sensible and consistent with the key rationales of natural justice.

### I INTRODUCTION

Natural justice comprises two pillars — the hearing rule and the rule against bias.<sup>1</sup> Although each rule is regularly treated as distinct, they are interrelated principles of fairness that promote the objective of a fair hearing. The bias rule requires that decision-makers be sufficiently objective and disinterested so as to enable the appearance and reality of a fair hearing. The hearing rule requires that people affected by the exercise of official power be provided with sufficient notice of a possible adverse decision and a sufficient chance to put their own case before

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\* Alfred Deakin Professor, Law School, Deakin University. The author wishes to thank Greg Weeks for helpful comments and the reviewers for useful suggestions.

<sup>1</sup> The title of this article refers to natural justice, though much of its substantive analysis refers to procedural fairness. Justice Mason long ago suggested that ‘procedural fairness’ was a more satisfactory term than ‘natural justice’ to convey the flexible content of the obligation of officials to provide fair procedures when exercising their powers: *Kioa v West* (1985) 159 CLR 550, 585. This assumes the two terms are essentially similar and interchangeable, though one is preferable. Robertson more recently suggested that the two terms remain distinct in part because the arguably more technical nature of ‘procedural fairness’ may reinforce the procedural conception of fairness that prevails in Australian judicial review doctrine. A term that emphasises the procedural rather than substantive nature of fairness may also serve as a useful reminder that fairness in this context does not enable courts to enter substantive notions of fairness that are more associated with merits review: Alan Robertson, ‘Natural Justice or Procedural Fairness?’ (2016) 23(3) *Australian Journal of Administrative Law* 155, 156. This article proceeds on the assumption of Mason J, which appears borne out by recent cases such as *Hossain v Minister for Immigration and Border Protection* (2018) 264 CLR 123 (*‘Hossain’*), where the phrase ‘procedural fairness’ is mentioned several times and ‘natural justice’ is not mentioned once.

any decision is made. It is now well settled that a claim of bias may be waived by a party who makes an informed, voluntary decision and decides not to raise a timely complaint of bias.<sup>2</sup> The possibility of waiver of the other pillar of natural justice — the hearing rule — has received very little attention. This article examines two decisions of appellate courts which have considered waiver of the hearing rule. It is argued that, while the hearing rule provides important procedural protections to people affected by administrative decision-making, it can be waived. People can, and should be allowed to, make an informed decision to cast aside procedural entitlements and protections.<sup>3</sup> The article argues that the possibility of waiver of natural justice aligns with recent cases that have favoured a dignitarian justification for fairness. That dignitarian rationale places weight on the inherent value of treating people respectfully in the exercise of public power.<sup>4</sup> But it is useful to first explain the various purposes of natural justice and how those purposes are not undermined by the possibility of waiver.

## II THE SCOPE AND PURPOSE OF NATURAL JUSTICE

The duty to observe the rules of natural justice is extremely wide and deeply entrenched. The duty is wide because it is now well-settled that the obligation to observe the requirements of natural justice applies to virtually all decisions made under statutory powers.<sup>5</sup> The scope of that principle is amplified by the increasingly

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<sup>2</sup> The principles governing waiver of bias are examined in Harry Woolf et al, *de Smith's Judicial Review* (Sweet & Maxwell, 8th ed, 2018) 572–3 and Mark Aronson, Matthew Groves and Greg Weeks, *Judicial Review of Administrative Action and Government Liability* (Thomson Reuters, 6th ed, 2017) 715–21.

<sup>3</sup> The extent to which procedural requirements are immutable and cannot be varied is unclear. The majority in *SAAP v Minister for Immigration and Multicultural and Indigenous Affairs* (2005) 228 CLR 294 ('*SAAP*') adopted a fairly rigid approach to compliance with procedural requirements, which was distinguished in a fairly unconvincing manner in *SZIZO v Minister for Immigration and Citizenship* (2009) 238 CLR 627 ('*SZIZO*'). I describe the latter as unconvincing because it adopted a different and less onerous approach to the adherence of procedural requirements that was adopted in *SAAP*. The many reasons provided for this shift were not explained in detail in the brief decision of *SZIZO*. The net effect of these and other cases is to suggest it is very difficult to determine when procedural requirements are binding in a strict sense.

<sup>4</sup> This has long been advocated by Allan, who has argued that respectful (and fair) treatment has value in its own right: see, eg, TRS Allan, 'Procedural Fairness and the Duty of Respect' (1998) 18(3) *Oxford Journal of Legal Studies* 497; TRS Allan, *Constitutional Justice: A Liberal Theory of the Rule of Law* (Oxford University Press, 2001) 77–87. In claims of a denial of natural justice, the dignitarian rationale shifts the focus from the effect of the alleged unfairness (and whether it may have made a difference) to how unfairly the person seeking relief was treated.

<sup>5</sup> A point memorably asserted by Willes J in *Cooper v Wandsworth Board of Works* (1863) 14 CB NS 180, 190. His Lordship explained that the duty to provide a chance to be heard was a rule of 'universal application'. Those remarks were strongly endorsed in *Ridge v Baldwin* [1964] AC 40. On the deep roots of the duty: see also *Plaintiff*

wide approach the courts have taken to the rights or interests protected by the duty to observe the rules of natural justice.<sup>6</sup> There are exceptions. Natural justice can be excluded or limited by statute.<sup>7</sup> Courts may accept the exclusion of fairness more readily in situations where its requirements could defeat the very purpose of the power in question,<sup>8</sup> such as the issue of a search warrant,<sup>9</sup> or the enforcement of quarantine and other procedures intended to prevent the spread of disease.<sup>10</sup> In other instances, the requirements of fairness may be incompatible with the administrative regime that a statute creates.<sup>11</sup> Similar considerations may lead the courts to accept a diluted or weaker version of what the rules of fairness would normally require.<sup>12</sup> A subset of this exception includes decisions or hearings involving issues of national

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*M61/2010E v Commonwealth* (2010) 243 CLR 319, 352–3 [75] (*‘Offshore Processing Case’*); *S10/2011 v Minister for Immigration and Citizenship* (2012) 246 CLR 636, 658–9 [66] (Gummow, Hayne, Crennan and Bell JJ) (*‘S10/2011’*). Natural justice also applies to many, but not all, prerogative decisions and where it applies there may be difficult questions about remedies: see Mark Leeming, ‘Judicial Review of Vice-Regal Decisions: *South Australian v O’Shea*, Its Precursors and Its Progeny’ (2015) 36(1) *Adelaide Law Review* 1, 18–21. One remaining qualification to the scope of fairness is the requirement that those seeking remedies identify the interest that is affected. See, eg, the subtle discussion of whether the possibility of prolonged immigration detention generated an ‘interest’ to which the rules of fairness applied in *Offshore Processing Case* (n 5) 353 [76]–[77]. This short analysis by the High Court makes clear that an interest in the relevant sense may not always arise in complex administrative procedures.

<sup>6</sup> *Offshore Processing Case* (n 5) 353; *S10/2011* (n 5) 658 [66] (Gummow, Hayne, Crennan and Bell JJ).

<sup>7</sup> Legislation must be phrased ‘clearly and expressly’ to successfully limit or exclude any duty to act fairly: *Wiseman v Borneman* [1971] AC 297, 318 (*‘Wiseman’*). The courts approach this requirement with strictness: see generally Matthew Groves, ‘Exclusion of the Rules of Natural Justice’ (2013) 39(2) *Monash University Law Review* 286. The strict doctrinal approach examined in that article continues: see, eg, *BVD17 v Minister for Immigration and Border Protection* [2019] HCA 34, [45]–[57] (Edelman J).

<sup>8</sup> This was accepted in principle in *Wiseman* (n 7) 308. The authors of *de Smith* note that ‘remarkably few’ enforcement powers can be exercised without prior notice: Harry Woolf et al (n 2) 488.

<sup>9</sup> *R v Peterborough Justices; Ex parte Hicks* [1977] 1 WLR 1371.

<sup>10</sup> *R v Davey* [1899] 2 QB 301, 305–6; *Pacific Century Production Pty Ltd v Watson* (2001) 113 FCR 466, 475–8.

<sup>11</sup> See, eg, *CPCF v Minister for Immigration and Border Protection* (2015) 255 CLR 514, 558–9 [115]–[119] (Hayne and Bell JJ), 621–4 [366]–[372] (Crennan J, Gageler J agreeing on this point). In that case, the High Court found that extraordinary powers granted to maritime officers, enabling them to detain and transfer asylum seekers intercepted at sea, were not subject to the requirements of fairness. The Court was influenced by the practical difficulties that would arise if maritime officials were required to provide hearing rights during difficult journeys at sea.

<sup>12</sup> See, eg, *R (on the Application of Bourgass) v Secretary of State for Justice* [2016] AC 384, 422–3 [98]–[102]. Lord Reed, with whom the other Law Lords agreed, held that prisoners facing disciplinary proceedings were entitled to receive ‘genuine and

security or allegations related to terrorism, where the courts appear more willing to accept that the duty to observe the requirements of fairness has been excluded or greatly limited.<sup>13</sup>

These general principles governing the exclusion of fairness are subject to some important qualifications. One is that the legislative exclusion of fairness in judicial proceedings faces significant constitutional obstacles. Procedural fairness is central to the institutional integrity of courts and their ability to exercise judicial power.<sup>14</sup> This constitutional imperative does not entrench the whole of the judicial model or require that all of its traditional rules always be followed. They may be varied without breaching constitutional requirements, so long as the procedure as a whole is fair and avoids practical injustice.<sup>15</sup> Another important point about the exclusion of fairness relates to flexibility, or rather a lack of it. Provisions that exclude basic procedural rights often face constitutional peril if they impose a ‘blanket and inflexible’ limit or prohibition of some sort.<sup>16</sup> The important aspect of these constitutional considerations for present purposes is the need to preserve judicial discretion. Courts must be able to ensure that practical unfairness can be avoided in their proceedings,<sup>17</sup> and

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meaningful’ disclosure of adverse material about the charges they faced. Lord Reed accepted that entitlement was not absolute. Relevant material could be withheld if ‘other overriding interests may be placed at risk’: at 423 [103].

<sup>13</sup> Division arose on this issue in *Bank Mellat v HM Treasury [No 2]* [2014] AC 700, 775. A key question in the case was whether an extraordinary power to impose restrictions on entities suspected of involvement with terrorism-related activities evidenced an intention to exclude requirements of fairness (in the form of a duty to undertake consultation). All members of the Supreme Court accepted the duty to consult could be excluded by sufficiently clear legislation or be incompatible with the nature of the power. A majority held the duty to consult remained in the legislative regime at hand: at 775–8 [31]–[37] (Lord Sumption, with whom Baroness Hale, Lords Kerr, Clarke, and Dyson agreed on this point). See also Lord Neuberger’s comments at 817–8 [180]–[183], in which he agreed with and expanded on the majority’s reasoning. The dissenting Law Lords held that the unique procedural regime necessarily excluded any common law duty of prior consultation: see especially 809–11 [143]–[153] (Lord Hope, with Lords Reed and Carnwath agreeing).

<sup>14</sup> *Assistant Commissioner Condon v Pompano Pty Ltd* (2013) 252 CLR 38, 108 [87] (Gageler J) (*‘Pompano’*). See also *RCB v Justice Forrest* (2012) 247 CLR 304, 321 [42] (French CJ, Hayne, Crennan, Kiefel and Bell JJ).

<sup>15</sup> *Pompano* (n 14) 100 [157] (Hayne, Crennan, Kiefel and Bell JJ).

<sup>16</sup> *Graham v Minister for Immigration and Border Protection* (2017) 263 CLR 1, 27 [49] (Kiefel CJ, Bell, Gageler, Keane, Nettle and Gordon JJ). See also *Bodruddaza v Minister for Immigration and Multicultural Affairs* (2007) 228 CLR 651, 671–2 [53]–[60] (Gleeson CJ, Gummow, Kirby, Hayne, Heydon and Crennan JJ); *International Finance Trust Company Ltd v New South Wales Crime Commission* (2009) 240 CLR 319, 354–5 [54]–[56] (French CJ), 385–6 [155]–[160] (Heydon J) (*‘International Finance’*).

<sup>17</sup> *Pompano* (n 14) 105 [178], 115 [212] (Gageler J). The connection between fairness and the avoidance of practical injustice was made by Gleeson CJ in *Re Minister for Immigration and Multicultural Affairs; Ex parte Lam* (2003) 214 CLR 1, 13–14 [37]–[38]

must have a level of procedural flexibility to do so. That flexibility can enable courts to apply a waiver of fairness in appropriate cases. A final important point relates to the position of tribunals and other administrative bodies, which are not subject to the constitutional requirements governing procedural rights in judicial proceedings. Administrative tribunals are typically granted considerable discretion over their procedures,<sup>18</sup> which is amplified by statutory requirements that they conduct proceedings in an informal manner,<sup>19</sup> and to act without regard to technicalities and legal forms.<sup>20</sup>

The constitutional need to preserve procedural flexibility in the courts mirrors the requirements of fairness itself. The duty of courts and administrative decision-makers to be fair may be constant in principle, but its practical content will always depend heavily on the circumstances of any particular case.<sup>21</sup> The basic elements of fairness require that people know the case against them and be given a reasonable opportunity to put their own case forward to an impartial decision-maker.<sup>22</sup> Fairness

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(‘*Ex parte Lam*’). It has been endorsed many times: see, eg, *CPCF v Minister for Immigration and Border Protection* (2015) 255 CLR 514, 607 [306] (Kiefel J); *Minister for Immigration and Border Protection v WZARH* (2015) 256 CLR 326, 337 [34]–[36] (Kiefel, Bell and Keane JJ), 342 [57] (Gageler and Gordon JJ); *Minister for Immigration and Border Protection v SZMTA* (2019) 363 ALR 599, 610 [38] (Bell, Gageler and Keane JJ), 618 [77] (Nettle and Gordon JJ).

<sup>18</sup> See, eg, *Administrative Appeals Tribunal Act 1975* (Cth) s 33(1)(a); *Civil and Administrative Tribunal Act 2013* (NSW) s 38(1); *South Australian Civil and Administrative Tribunal Act 2013* (SA) s 43(3); *State Administrative Tribunal Act 2004* (WA) s 32(5).

<sup>19</sup> See, eg, *Administrative Appeals Tribunal Act 1975* (Cth) s 33(1)(b); *Civil and Administrative Tribunal Act 2013* (NSW) s 38(4); *Queensland Civil and Administrative Tribunal Act 2009* (Qld) s 28(3)(d); *South Australian Civil and Administrative Tribunal Act 2013* (SA) s 39(1)(a); *Victorian Civil and Administrative Tribunal Act 1998* (Vic) s 98(1)(d); *State Administrative Tribunal Act 2004* (WA) s 9(b).

<sup>20</sup> See, eg, *Administrative Appeals Tribunal Act 1975* (Cth) s 33(1)(b); *Civil and Administrative Tribunal Act 2013* (NSW) s 38(4); *South Australian Civil and Administrative Tribunal Act 2013* (SA) s 39(1)(c); *State Administrative Tribunal Act 2004* (WA) s 32(2)(b). Some limits upon the extent of such powers were identified in *Minister for Immigration and Citizenship v Li* (2013) 249 CLR 332. That decision held that such powers must be exercised reasonably and, most importantly, adopted an expansive approach to the notion of reasonableness. That expansive approach meant that a migration tribunal which had rejected an application for an adjournment by one of the parties could not simply reply upon its power to act informally and without regard to legal technicalities or legal forms. That discretion was subject to the requirements of reasonableness and rationality which obliged the tribunal to consider the factors that weighed for and against an adjournment and, if the application was refused, provide some reasoned explanation to that effect: 368–9 [83]–[86] (Hayne, Kiefel and Bell JJ), 379–80 [122]–[124] (Gageler J).

<sup>21</sup> The details of this general rule are explained in Aronson, Groves and Weeks (n 2) 500–5.

<sup>22</sup> *Minister for Immigration and Border Protection v SZSSJ* (2016) 259 CLR 180, 207 [83].

requires these opportunities be provided, but not necessarily that they be exercised.<sup>23</sup> There are many reasons for this odd limitation. One arises from the dignitarian justification for fairness, which accepts the inherent value of the respectful treatment that the requirements of fairness foster.<sup>24</sup> Another is the practical one often arising with unrepresented people. The courts have noted the ‘clear line’ between explaining or assisting unrepresented parties about the value of procedures, or the ‘appropriateness of a suggested course’, as opposed to exercising that right on their behalf.<sup>25</sup> If courts and tribunals offer unrepresented parties the opportunity to exercise hearing rights, but leave the decision on whether and how to exercise those rights to the unrepresented party, their own impartiality is preserved. Similar considerations arise for represented parties. The tactical choices that must regularly be made during hearings are generally the province of lawyers, rather than decision-makers. Whether parties are represented or not, they possess a level of autonomy that enables them to refuse the procedural opportunities that fairness requires be provided.<sup>26</sup> The possibility of waiver of fairness, for both represented and unrepresented parties, is therefore consistent with the general principles governing natural justice.

### III PRINCIPLED REASONS TO ALLOW WAIVER OF FAIRNESS

The cases in which the wider principles governing natural justice have been fashioned have not considered the possibility of waiver, but there are several reasons why waiver of natural justice can and should be possible. A key one arises from the ‘concern of the law ... to avoid practical injustice’.<sup>27</sup> It is explained below that waiver involves an informed and voluntary decision to forgo the right to object to an otherwise unfair procedure. Practical injustice is unlikely to arise if these requirements are met. It could even be argued that unfairness in such cases could occur if waiver is *not* allowed. Take the following hypothetical example. During a hearing, an unrepresented person is informed by a presiding judge or tribunal member that he or she can cross examine the witnesses of the other party. The unrepresented person replies ‘I have thought about it and decided I want things over with as soon as

<sup>23</sup> Keith Mason, ‘The Bounds of Flexibility in Tribunals’ (2003) 39 *AIAL Forum* 18, 24. Mason explained ‘the principles of natural justice are concerned with giving litigants a fair opportunity to make their case. The judicial officer does not have an obligation to ensure that such opportunity is availed of the nth degree’.

<sup>24</sup> A rationale noted in *R (Osborn) v Parole Board* [2014] AC 1115, 1149 [68] (Lord Reed) (*Osborn*); *Hossain* (n 1) 147–8 [72] (Edelman J, Nettle J agreeing on this point).

<sup>25</sup> *Wade v Comcare* (2002) 69 ALD 602, 607 (Drummond and Dowsett JJ).

<sup>26</sup> An exception are hearings involving national security, alleged terrorism and like issues. The hearing procedures for such cases often provide that the defendant or affected person not be given access to key evidence, or be present at some parts of the hearing: see, eg, *Administrative Appeals Tribunal Act 1975* (Cth) s 39A(9) (enabling, in limited circumstances the exclusion of both people seeking review of certain security related decisions and their lawyers).

<sup>27</sup> *Ex parte Lam* (n 17) 14 [38] (Gleeson CJ).

possible'. At the end of the hearing, the unrepresented person has a change of heart and requests that all the witnesses called by the other party be recalled for cross examination. Granting that request would cause delay, expense and inconvenience.<sup>28</sup> These same issues weighed on Griffiths J in *Twentyman v Secretary, Department of Social Security*.<sup>29</sup> The applicant in that case left the tribunal hearing after he was examined by his barrister, which deprived the respondent agency of any chance to cross-examine him. On appeal, the applicant claimed a denial of natural justice because adverse issues were not fairly put to him. Justice Griffiths rejected the claim, holding that the applicant caused this problem 'by his own conduct'.<sup>30</sup> To allow a claim of unfairness in such cases would run counter to the sensible warning that Lord Mance issued in the *Al Rawi*<sup>31</sup> case: that fundamental rules like fairness and open justice 'ought to be regarded as sacrosanct, as long as they themselves do not lead to a denial of justice'.<sup>32</sup>

The qualification made by Lord Mance may itself be subject to further qualification, which can arise when there has been very grave unfairness. Some cases have suggested that an especially serious instance of unfairness may warrant relief by the very reason of the gravity of the unfairness. Justice Edelman noted a similar possibility in criminal appeals, when he suggested that defects in a trial could sometimes be so fundamental 'that it can be said, without more, that a substantial miscarriage of justice has occurred'.<sup>33</sup> His Honour thought there was 'no rigid or predefined formula to determine what amounts to a fundamental error' of that nature, but he accepted that some 'serious denials of procedural fairness' could qualify.<sup>34</sup> This reasoning is at odds with several recent cases, in which a majority of the High Court held that the 'materiality' of an error is important to determining whether the error is jurisdictional in character.<sup>35</sup> Many aspects of this conception of materiality remain unsettled,<sup>36</sup> but it certainly requires a court to be satisfied that legal error, including a denial of fairness, might have made a difference before relief will be issued.

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<sup>28</sup> It could arguably also confer unrepresented parties with a procedural right not available to represented parties, which itself could be unfair.

<sup>29</sup> [2019] FCA 586 ('*Twentyman*').

<sup>30</sup> *Ibid* [41].

<sup>31</sup> *Al Rawi v Security Services* [2012] 1 AC 531.

<sup>32</sup> *Ibid* 597 [115].

<sup>33</sup> *OKS v Western Australia* (2019) 364 ALR 573, 582 [36].

<sup>34</sup> *Ibid*. Justice Edelman drew support from the adoption of such reasoning by a unanimous High Court in *Weiss v The Queen* (2005) 224 CLR 300, 317 [45].

<sup>35</sup> See, eg, *Minister for Immigration and Border Protection v WZARH* (2015) 256 CLR 341 [56] (Gageler and Gordon JJ); *Hossain* (n 1) 134–5 [29]–[31] (Kiefel CJ, Gageler and Keane JJ); *BVD17 v Minister for Immigration and Border Protection* [2019] HCA 34, [65]–[67] (Edelman J).

<sup>36</sup> A key issue is whether the materiality of an error that is established is an element of jurisdictional error, or instead goes only to remedial discretion. The High Court divided sharply on this issue in the two key cases of *Hossain* (n 1) and *Minister for Immigration and Border Protection v SZMTA* (2019) 363 ALR 599. An assessment

One issue that remains unclear is whether the requirement of materiality does not apply in cases involving some sort of fundamental error.<sup>37</sup>

Whether a requirement of materiality should not apply in cases of fundamental unfairness could depend on why Edelman J thought some especially grave errors might essentially speak for themselves. The explanation given for this possibility in the early English case of *Mayes v Mayes* was one of jurisdiction.<sup>38</sup> The Court in that case reasoned that ‘a rule of natural justice which goes to the very basis of judicature ... cannot be waived.’ The Court explained that ‘[y]ou cannot by waiver convert a nullity into a validity’.<sup>39</sup> This reasoning was expressly doubted by the New South Wales Court of Appeal in *Escobar v Spindaleri*,<sup>40</sup> when Samuels JA suggested that lawyers could ‘always ... waive in the sense of not wishing to exercise some procedural or other forensic right’.<sup>41</sup> His Honour reasoned that a party who made an informed and voluntary choice of this nature ‘has not been deprived of any right or privilege and hence has not been denied natural justice’.<sup>42</sup> That reasoning points to a paradox in many possible claims of waiver of fairness. The rules of fairness are arguably not waived in cases when a party declines to take advantage of one or more procedural benefits. In such cases, the opportunity that the rules of fairness require be provided has been given. In these instances, the requirements of fairness are discharged by the *offer* of a procedural opportunity or benefit, not its exercise. Any refusal of that benefit or opportunity does not amount to a waiver of fairness. It is better described as acquiescence — agreement to a course of procedure — which itself can lead to a finding that fairness was not denied.

Another reason why serious unfairness might constitute a self-evident justification for a finding of unfairness was mentioned without detailed explanation in *Hossain*.<sup>43</sup> Justice Edelman, with whom Nettle J agreed on this point, held that the requirement

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across both cases suggests Kiefel CJ, Bell, Gageler and Keane JJ considered that the materiality of an error was an ingredient of jurisdictional error, whereas Justices Nettle, Gordon and Edelman considered that materiality went to remedial discretion.

<sup>37</sup> This possibility is a live one because of suggestions, noted below, that notions of materiality *generally* require that an error deprives a party of the possibility of a successful outcome: *Hossain* (n 1) 147–8 [72] (Edelman J, Nettle J agreeing at 137 [40]). If the requirement is a general one, it surely has exceptions.

<sup>38</sup> *Mayes v Mayes* [1971] 1 WLR 679.

<sup>39</sup> *Ibid* 684.

<sup>40</sup> (1986) 7 NSWLR 51.

<sup>41</sup> *Ibid* 62.

<sup>42</sup> *Ibid*. President Kirby, with whom Glass JA agreed, held that the lawyer of one party was effectively precluded from making a closing address after a testy exchange with the trial judge. That finding meant his Honour did not need to consider waiver in any detail.

<sup>43</sup> *Hossain* (n 1) 123.

of materiality ‘will generally require the error to deprive a person of the possibility of a successful outcome’.<sup>44</sup> But his Honour added that

[t]here may be unusual circumstances where an error is so fundamental that it will be material whether or not the person is deprived of the possibility of a successful outcome. One circumstance, for reasons that could include respect for the dignity of the individual, may be an extreme case of a denial of procedural fairness.<sup>45</sup>

It was notable on several counts that Edelman J relied on the English decision of *Osborn*. The first was that *Osborn* was concerned solely with an alleged denial of natural justice. Justice Edelman drew support from *Osborn* when suggesting that gross unfairness might sweep aside requirements of materiality, though just as materiality has wider application, one might wonder whether the same applies to the Court’s emphasis on dignity. Perhaps notions of respect could be extended to requirements of procedure and reasonableness.<sup>46</sup> Secondly, *Osborn* drew a connection between dignitarian notions of fairness and respect. Lord Reed explained in *Osborn* that observance of the rules of natural justice led to fair and respectful conduct by administrative officials. That respectful treatment acknowledged the dignity of those affected by the exercise of official power.<sup>47</sup> But Lord Reed appeared mindful of the practical limits of this possibility when he reasoned that

natural justice is intuitively understood to require a procedure which pays due respect to persons whose rights are significantly affected by decisions taken in the exercise of judicial or administrative functions. Respect entails that such persons ought to be able to participate in the procedure by which the decision is made, *provided they have something to say which is relevant to the decision to be taken*.<sup>48</sup>

Justice Edelman cited this very paragraph for its emphasis upon dignity but did not consider the limits that Lord Reed seemed to envisage in his suggestion that affected people must have ‘something relevant to say’. Lord Reed’s dictum should not be taken literally, so as to accept that people without relevant material can be treated badly. His Lordship surely instead meant that showing respect for the dignity of affected people is important, but the legal consequences of a failure to do so become apparent when it is clear an affected person wanted to participate in a hearing and

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<sup>44</sup> Ibid 147 [72]. See 137 [40] for Nettle J’s agreement on this point.

<sup>45</sup> Ibid 147–8 [72].

<sup>46</sup> Chief Justice Allsop did so in *Minister for Immigration and Border Protection v Stretton* (2016) 237 FCR 1, 5 [9] (*‘Stretton’*).

<sup>47</sup> This was one of several rationales that Lord Reed identified as supporting the duty to act fairly. Others included the possibility that fair procedures could lead to more informed and thus better quality decisions. Another factor was that observing the rules of fairness could lessen the feelings of injustice of affected people and their families: *Osborn* (n 24) 1149–50 [67]–[70].

<sup>48</sup> [2014] AC 1115, 1149 [68] (emphasis added).

had something relevant to say. If that reasoning is applied to the notion of materiality, one could ask how a breach of fairness could be material if the person denied a procedural right did not have something relevant to say.

Chief Justice Allsop of the Federal Court has taken a slightly different approach in a series of cases and speeches, in which his Honour has drawn connections between fairness and the dignity of those over whom public power is exercised.<sup>49</sup> His Honour has suggested that statutory hearing requirements involve a recognition of the dignity of affected people.<sup>50</sup> His Honour expanded on that possibility in a recent speech, arguing that the connection between dignitarian imperatives and the exercise of public authority was as much societal as it was legal.<sup>51</sup> The difficult question of whether and how arguably vague notions about human dignity, or other potentially wide normative notions, can qualify the exercise of public or statutory power in a coherent manner can be put aside for present purposes. It can, however, be suggested that notions of dignity do not necessarily stand against waiver. There are two reasons. First, waiver provides people with autonomy and choice. It would be wrong and arguably also an abuse of power to force people to attend hearings if they do not wish to. If people can spurn an entire hearing, surely they can decline particular procedures within a hearing. Waiver enables them to do so. Secondly, waiver essentially requires people to be held to their own conduct, if it is informed and voluntary. To require such consistency does not offend the dignity of people. A potential third and closely related point is that enforcing waiver can arguably protect the dignity of the other party. Hearings usually involve more than one party. Those who rely on waiver are entitled to expect some level of consistency from other parties.<sup>52</sup>

#### IV WAIVER OF THE BIAS RULE

The courts have long accepted that the bias rule can be waived. Before consideration of the key features of waiver of bias, it is useful to note the assumptions upon which waiver operates. An important presumption is that the bias rule applies to the exercise of judicial and administrative power. Any finding of waiver is an exception

<sup>49</sup> Justice Heydon invoked similar considerations in *International Finance* (n 16) 380–1 [143]–[145].

<sup>50</sup> *SZRUI v Minister for Immigration, Multicultural Affairs and Citizenship* [2013] FCAFC 80, [5]. His Honour drew a connection between dignity and requirements of fairness and reasonableness in *Stretton* (n 46) 5 [9].

<sup>51</sup> James Allsop, ‘The Foundations of Administrative Law’ (Speech, 12th Annual Whitmore Lecture, Federal Court of Australia, 4 April 2019). Allsop also stressed the importance of human dignity in the exercise of public power in James Allsop, ‘Values in Public Law’ (2017) 91(2) *Australian Law Journal* 118.

<sup>52</sup> This statement may hint at a parallel with estoppel, but the interaction between public law and estoppel principles — particularly the extent to which the former can draw from the latter — was said to have largely ended by the House of Lords in *R v East Sussex County Council; Ex parte Reprotech (Pebsham) Ltd* [2003] 1 WLR 348, 351 [6], 358 [35].

to the general application of the rule. The possibility of waiver does not mean that hearings and administrative processes can or should be biased.<sup>53</sup> It simply means that people affected by the exercise of judicial or administrative power can forgo their right to raise a complaint of bias. The bias rule arguably still applies to such hearings and processes because waiver only serves to preclude enforcement of the rule by the waiving party.

The key requirement for waiver of the bias rule is that any waiver must be fully informed and clear. The requirement to be informed is not absolute. Parties must have ‘full knowledge of all the facts *relevant* to the decision whether to waive or not’,<sup>54</sup> or the ‘nature of the case rather than the detail’.<sup>55</sup> The point at which this level of knowledge is reached may be difficult to gauge because the detail in support of a bias claim may accrue slowly during the course of a hearing.<sup>56</sup> Sometimes that tipping point may be difficult, almost impossible, to identify.<sup>57</sup>

The bias rule can be waived expressly but waiver is most commonly found to arise by implication, typically in the form of a failure to object. Findings of waiver by implication present a practical difficulty. When is it fair and reasonable to deem conduct that may be open to different interpretations, as silence or a failure to object often is, as sufficiently clear to support a finding of waiver?<sup>58</sup> The willingness of courts to draw such conclusions can depend greatly on whether a party is represented. Represented parties are generally bound by the conduct of their advocate, including any judgment of the representative on whether to raise or remain silent on a possible complaint

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<sup>53</sup> That presumption would be strong, perhaps beyond rebuttal, in criminal proceedings because fairness is the very essence of criminal trials. The different considerations applicable to criminal proceedings may explain why the cases discussing waiver make clear its application to civil proceedings: see, eg, *Michael Wilson & Partners Ltd v Nicholls* (2011) 244 CLR 427, 449 [76] (Gummow ACJ, Hayne, Crennan and Bell JJ).

<sup>54</sup> *Locabail (UK) Ltd v Bayfield Properties Ltd* [2000] QB 451, 475 [15] (emphasis added) (*‘Locabail’*).

<sup>55</sup> *Jones v DAS Legal Expenses Insurance Co Ltd* [2003] EWCA Civ 1071, [36].

<sup>56</sup> *Johnson v Johnson* (2001) 201 CLR 488, 516–17 [79] (Callinan J) (*‘Johnson v Johnson’*).

<sup>57</sup> Justice Basten discussed these issues in *Royal Guardian Mortgage Management Pty Ltd v Nguyen* [2016] NSWCA 88, [34]. His Honour described a claim of waiver of bias as ‘a false issue’, because the unfolding problems of the conduct of the trial meant there was no ‘inescapable point’ at which counsel had to request the judge to either cease his excessive interventions or abort the trial.

<sup>58</sup> The High Court has noted that this difficulty arises in claims of waiver more generally: *Expense Reduction Analysts Group Pty Ltd v Armstrong Strategic Management and Marketing Pty Ltd* (2013) 250 CLR 303, 315–16 [33] (French CJ, Kiefel, Bell, Gageler and Keane JJ).

of bias.<sup>59</sup> Courts are naturally more inclined to deem the silence of an experienced lawyer as clear and unequivocal for the purposes of waiver because making difficult forensic decisions is the very reason people engage lawyers. Things are necessarily different for unrepresented parties, which may explain why the courts have refused to find waiver in apparently clear cases such as when an unrepresented party walks out of a hearing.<sup>60</sup> A court must be satisfied that unrepresented parties realise and accept the consequences of their behaviour, including a refusal to complain about possible bias.<sup>61</sup>

The final component of waiver relates to timing. Parties aware of the key issues that could support a claim of bias can be deemed to have waived the right to complain if they fail to raise the point promptly. The meaning of this requirement to act in a timely way has variously been described as allowing parties a ‘sufficient time’,<sup>62</sup> which can enable even the most experienced counsel to wait a day or so to consider their options.<sup>63</sup> The leeway available for even experienced counsel to pause and consider whether or not to raise an objection<sup>64</sup> is consistent with other cases which make clear that unrepresented parties should be given much greater licence when faced with this decision;<sup>65</sup> though even an unrepresented party may be expected to take immediate issue with conduct if it is ‘so obviously objectionable’ that an appeal court could reasonably say the party was ‘bound to object then and there’.<sup>66</sup>

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<sup>59</sup> In *Smits v Roach* (2006) 227 CLR 423, 441 [46], Gleeson CJ, Heydon and Crennan JJ noted that the assumption in adversarial litigation was that parties were ‘generally bound by the conduct of counsel’ (emphasis added), suggesting there exists room for the presumption to be displaced. Justice Kirby identified several practical reasons why imputing knowledge of the lawyer to the client presented difficulties: at 468 [133]. One difficult question is when lawyers can reasonably be expected to consider complex procedural issues, such as bias claims, without conferring with clients.

<sup>60</sup> See, eg, *Mond v Berger* (2004) 10 VR 534, 579 [248].

<sup>61</sup> Though Flick J suggested such differences might fall away when unrepresented parties have had the consequences of abandoning a possible bias claim clearly explained to them: *Kennedy v Secretary, Department of Industry [No 2]* [2016] FCA 746, [38] (‘Kennedy’).

<sup>62</sup> *Vakauta v Kelly* (1989) 167 CLR 568, 579 (Dawson J) (‘*Vakauta*’).

<sup>63</sup> This period could also allow the party to obtain a copy of the hearing transcript, which can greatly assist any decision: *John Fairfax Publications Pty Ltd v Maurice Kriss* [2007] NSWCA 79, [26]–[27].

<sup>64</sup> The reason, Callinan J suggested, is that even experienced counsel may struggle with the ‘almost impossible’ choice between raising the issue (and thus offending the decision maker) or risking waiver (and thus surrendering the right to object): *Johnson v Johnson* (2001) (n 56) 517–18.

<sup>65</sup> This in turn can vary, depending on whether the unrepresented party is very experienced (as some are) or new to legal proceedings. This may not be the case when an unrepresented party receives a clear explanation of the consequences of not pursuing a course of action: *Kennedy* (n 61), [38] (Flick J).

<sup>66</sup> *Huang v University of New South Wales* (2006) 154 FCR 16, 26 [39] (Rares J).

The justifications for the possibility of waiver of bias are pragmatic ones of fairness. In *Vakauta v Kelly*,<sup>67</sup> a majority of the High Court accepted that it would be ‘unfair and wrong’ if a party who knew the facts of a possible complaint of bias could keep that claim in abeyance for future use, such as when the substantive decision was delivered. To allow parties to keep a possible bias claim ‘up their sleeve’ for future use could cause needless appeals that would waste judicial time and court resources. It would also be unfair to other parties and undercut the principle of finality in proceedings.

## V WAIVER OF THE HEARING RULE

Most of the cases that have considered claims of waiver of natural justice have not analysed the issue in any detail.<sup>68</sup> Different cases have accepted that waiver of fairness is ‘possible’,<sup>69</sup> or ‘conceivable’,<sup>70</sup> or have suggested that waiver would have been found if the case at hand had not failed for other reasons.<sup>71</sup> Others have accepted the possibility of waiver in principle but found it unnecessary to consider at length.<sup>72</sup> In the one instance where the issue arose clearly in arguments before the High Court,<sup>73</sup> the oral arguments heard by the Court did not feature in the resulting decision.<sup>74</sup> Justice Weinberg drew attention to the ‘relative paucity of authority

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<sup>67</sup> *Vakauta* (n 62) 572 (Brennan, Deane and Gaudron JJ).

<sup>68</sup> See, eg, *Twentyman* (n 29) [40] where Griffiths J held, without detailed explanation, that the applicant had waived part of his hearing rights by walking out during part of the hearing. See also *Caliguiri v Attorney-General (on behalf of the State of Victoria) & others [No 2]* [2019] VSC 365, [189]–[197] where Garde J noted detailed submissions from the parties about possible waiver of natural justice, held no waiver had occurred but did not directly rule on whether waiver of fairness was possible. Kiefel CJ, Bell and Keane JJ recently mentioned the possibility of waiver of the requirements of fairness in a closed criminal trial. Their Honours expressed no view in the issue and noted it was not pressed before the High Court: *Hunt v The Queen* [2019] HCA 40, [50] quoting Aronson, Groves and Weeks (n 2) 492–6.

<sup>69</sup> See, eg, *Thompson v Ludwig* (1991) 37 IR 437, 453 where Gray J stated ‘there is no reason in principle why waiver should not be possible’. This finding was overturned by the Full Court of the Federal Court on other grounds, but without any adverse comments on Gray J’s remarks on waiver: *Thompson v Ludwig* [1992] FCA 285 (Black CJ, Northrop and Lee JJ).

<sup>70</sup> *Attia v Health Care Complaints Commission* [2017] NSWSC 1066, [225].

<sup>71</sup> *Fato v Regione Calabria Pty Ltd* [2014] VSC 435, [148]–[149], where Kyrou JA held that if he was wrong to hold that a magistrate had not breached the rules of fairness, the failure of the appellant’s counsel to object to the conduct complained of would have constituted waiver.

<sup>72</sup> *Lawrie v Lawlor* (2016) 168 NTR 1, [419] (Heenan AJ, Doyle and Duggan AJA agreeing at [245]).

<sup>73</sup> Transcript of Proceedings, *SZAYW v Minister for Immigration and Multicultural and Indigenous Affairs* [2006] HCATrans 046.

<sup>74</sup> That case was *SZAYW v Minister for Immigration and Multicultural and Indigenous Affairs* (2006) 230 CLR 486.

dealing with the question of waiver in relation to the operation of the rules of natural justice.<sup>75</sup> His Honour noted that some cases had accepted that compliance with particular aspects of the hearing rule, such as notice requirements, could be waived. ‘These cases’, Weinberg J reasoned, ‘suggest that minor aspects of the [hearing] rule may be impliedly waived’.<sup>76</sup> His Honour also acknowledged that other cases had resolved such issues by the discretionary refusal of relief for a possible denial of natural justice.

In two recent instances where waiver of fairness was accepted in principle, there was little substantive reasoning about that finding, though each case is instructive. In *Byrne v Rail Corporation of NSW*,<sup>77</sup> the New South Wales Industrial Relations Commission examined the many passing and inclusive references in case law to waiver and concluded it was ‘well established’ that people can waive hearing requirements.<sup>78</sup> The Commission thought it equally clear that ‘each case involving waiver turns on its own facts’.<sup>79</sup> Waiver was argued to have occurred in that case when one party was excluded from the hearing at the request of the other, so that he could not adjust his evidence in light of a potentially conflicting account of events. The Commission held that waiver was not established because the lawyer of the excluded party was clearly ambivalent about the exclusion and only sought to object once the consequences of that course became apparent.<sup>80</sup> But the Commission suggested that ‘it would be necessary for there to be clear and express waiver by counsel’ to abrogate basic requirements, such as the right of a party to be present during a hearing, which implies that it thought even the most basic right could be waived if done so clearly enough.<sup>81</sup>

Two years later, in *New Price Retail Services Pty Ltd v Hanna*,<sup>82</sup> the New South Wales Supreme Court concluded that there ‘is no reason in principle’ why there could not be waiver of a breach of natural justice.<sup>83</sup> That case involved the adoption of reports of a referee who was determining a franchise dispute. One party claimed the conduct of the referee created an apprehension of bias, in part because many of

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<sup>75</sup> *Percerep v Minister for Immigration and Multicultural Affairs* (1998) 86 FCR 483, 503 (Weinberg J).

<sup>76</sup> *Ibid.*

<sup>77</sup> [2012] NSWIRComm 117 (*‘Byrne’*).

<sup>78</sup> *Ibid* [148].

<sup>79</sup> *Ibid.*

<sup>80</sup> *Ibid* [151].

<sup>81</sup> *Ibid* [150]. Even the right to be present is not absolute. If people behave in an extremely disruptive or disrespectful way, they can be removed from the hearing without any breach of the rules of fairness. A variation of this can occur in criminal proceedings when a defendant absconds during the trial. The law governing this issue, in which many cases refers to such defendants having waived their right to be present during trial, is detailed in *R v Gee* (2012) 113 SASR 372.

<sup>82</sup> [2014] NSWSC 553 (*‘New Price Retail’*).

<sup>83</sup> *Ibid* [81] (Sackar J).

his communications were with one rather than both parties. The court noted that the parties had contacted each other and the referee many times. Over this lengthy period, the party claiming a denial of natural justice had become ‘well aware’ of both the preliminary views of the referee and the process by which he was gathering and considering material. The issues had become so clear during these many communications, the Court concluded, that any breach of fairness that might have occurred ‘was well and truly waived’ because the process had continued without objection.<sup>84</sup>

Each of these two cases sheds some useful light on how waiver can operate. *Byrne* makes clear that determining whether natural justice has been waived depends on the same contextual approach used to determine what fairness requires. That case also suggested that the more basic the procedural right, perhaps the clearer waiver needs to be. *New Price Retail* arguably illustrates how waiver does not necessarily require parties to make difficult decisions on the spot. Many cases are long, drawn out and conducted mostly in offices rather than in courts, where there are many chances for parties to easily raise concerns about procedural issues. It is difficult to regard the enforcement of waiver in such circumstances as unreasonable or unfair.

Two cases from appellate courts in Victoria and England show in more detail how these issues may operate.

## VI WAIVER AND THE VICTORIAN COURT OF APPEAL: *MH6 v MENTAL HEALTH REVIEW BOARD*

The possibility of waiver of the hearing rule was considered in detail by the Victorian Court of Appeal in *MH6 v Mental Health Review Board*.<sup>85</sup> The applicant (MH6) had been detained for more than six years in a psychiatric institution under authority of a compulsory treatment order. He exercised a statutory right of administrative reconsideration of his continued detention by the Victorian Mental Health Review Board.<sup>86</sup> When the Board decided to continue MH6’s involuntary detention, he sought review of its decision in the Victorian Civil and Administrative Tribunal (‘VCAT’).<sup>87</sup> VCAT conducted an oral hearing, in which it received statements and evidence from several people, but questions arose about the order that the proceedings should follow.<sup>88</sup> Counsel for MH6 suggested that the respondent agency should present its case first. The presiding tribunal member explained that, as a general rule, applicants in proceedings before VCAT normally presented their case first and that the hearing at hand should follow that practice. Counsel for MH6 explained that registry staff of VCAT

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<sup>84</sup> Ibid [193].

<sup>85</sup> (2009) 25 VR 382.

<sup>86</sup> Contained in *Mental Health Act 1986* (Vic) ss 29(1)–(2).

<sup>87</sup> A right provided by *Mental Health Act 1986* (Vic) s 120.

<sup>88</sup> The confusion about these matters reflects longstanding uncertainty in Australian law about evidence and proof in administrative hearings. Practice Directions governing Australian merits review tribunals rarely address the order of proceedings. The prevailing Direction for VCAT was no exception.

had advised him that the respondent would open proceedings, so he had organised his case and witnesses accordingly. After discussion between the bench and bar table, counsel for MH6 called those of his witnesses who were present at the time.<sup>89</sup> The previously filed statements of other witnesses were accepted without objection and the Tribunal gave the parties leave to file further submissions. The respondent filed its submissions first, followed by the applicant. VCAT reserved the matter and later decided that MH6 should remain under involuntary detention.<sup>90</sup> MH6 sought judicial review of that decision, claiming that VCAT had erred by requiring that he present his case before the respondent.

Justice Hansen at first instance held that there had been no denial of natural justice because the respondent had filed witness statements well before the hearing.<sup>91</sup> The applicant therefore ‘knew the case to be met’ and suffered no disadvantage by the order of the hearing.<sup>92</sup> The judge drew support for this conclusion by noting that the applicant’s lawyer did not recall any of his witnesses or provide any supplementary evidence.<sup>93</sup> The mention of those issues suggested that the judge believed the applicant could not point to any disadvantage or practical unfairness caused by the order of proceedings.

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<sup>89</sup> This aspect of the VCAT proceeding is extracted at: *MH6 v Mental Health Review Board* (2009) 25 VR 382, 385–6 [12].

<sup>90</sup> The Tribunal had a *de novo* review power and could exercise the same determinative powers as the Board: *Victorian Civil and Administrative Tribunal Act 1998* (Vic) s 51.

<sup>91</sup> There was no doubt that VCAT was subject to the requirements of natural justice because several provisions of its governing statute required the Tribunal to act fairly. Most notably *Victorian Civil and Administrative Tribunal Act 1998* (Vic) s 97 (expressly requiring VCAT to act fairly), s 98(1)(a) (expressly stating that VCAT is bound by the rules of natural justice) and s 102(1) (requiring VCAT to provide a party with a ‘reasonable opportunity’ to call or give evidence, examine and cross-examine witnesses and make submissions). The common law requirements of fairness were also applicable and could supplement these particular statutory requirements.

<sup>92</sup> *MH6 v Mental Health Review Board* [2008] VSC 345, [68]. The judge considered the order of proceedings as an issue of fairness rather than as part of the rules of evidence. It is unlikely that recourse to evidentiary principles would have been helpful. In theory, evidentiary rules could have required the public authority to make its case first in order to discharge a burden of proof required for the continued detention of MH6 (this assumes the initial burden was upon the applicant to establish a case for his release, rather upon the hospital to establish a case for continued detention). That issue was not raised in part because evidentiary notions central to judicial hearings, such as a burden or onus of proof, do not normally apply to administrative hearings: See, eg, *Sun v Minister for Immigration and Border Protection* (2016) 243 FCR 220. That case made clear that administrative tribunals and other like bodies can only act on rationally probative material. This finding edges towards a burden or onus of proof because parties will inevitably wish to lead material that enables the tribunal to make findings each party seeks.

<sup>93</sup> *MH6 v Mental Health Review Board* (n 92).

The Court of Appeal found that the respondent should have opened the VCAT proceedings because this course would enable those resisting compulsory detention to hear and respond to the case against their release.<sup>94</sup> But the Court of Appeal held that use of a different procedure did not cause unfairness in this instance because the applicant was ‘well aware of the case against him and had a full and fair opportunity to be heard in respect of that case’.<sup>95</sup> That finding was sufficient to dispose of the appeal but the Court also considered the possibility of waiver in some detail. The Court of Appeal reasoned that, as a general rule, there was ‘no reason of principle and no authority to doubt that full observance of the hearing rule may be waived’.<sup>96</sup> Their honours also concluded that waiver would have defeated any finding that the applicant had been denied natural justice in the case at hand.<sup>97</sup>

The reasoning of the Court of Appeal had two notable strands. One was the holistic view taken of fairness. The conduct said to give rise to waiver was viewed in the wider context of the case. The Court of Appeal noted that the content of the rules of fairness depended on the wider legislative framework within which the decision under review was made, the procedural rules governing the hearing before VCAT and also ‘the conduct of the parties prior to or during the hearing’.<sup>98</sup> An important part of the procedure of this case was that all material considered in the VCAT hearing was lodged well in advance and could not be departed from without leave of the Tribunal.<sup>99</sup> The applicant lodged his material in advance of the hearing before the respondent agency, called his witnesses in the hearing before the respondent agency and, for each procedure, did so without objection. The order of the hearing neither surprised the applicant, nor denied him a chance to know and test the case against him.<sup>100</sup>

The reasoning in *MH6* was also notable for its extensive reference to bias cases, which is surprising because most earlier cases that have mentioned possible waiver of the hearing rule have taken little or no account of the very detailed principles arising from bias cases. The Court of Appeal adopted the orthodox position established in bias cases, which is that waiver can be founded on either positive conduct or deliberate silence, and that in each instance any decision to waive a claim of bias

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<sup>94</sup> *MH6 v Mental Health Review Board* (n 89) 390 [26]–[28]. There is no express requirement to this effect in the *Victorian Civil and Administrative Tribunal Act 1998* (Vic), or any of the other Australian statutes that create merits review tribunals of general jurisdiction.

<sup>95</sup> *Ibid* 392 [33].

<sup>96</sup> *Ibid* 396 [53].

<sup>97</sup> *Ibid*.

<sup>98</sup> *Ibid* 391 [30].

<sup>99</sup> *Ibid* 392 [33].

<sup>100</sup> *Ibid* 392 [34], in which the Court of Appeal noted that the applicant ‘did not attempt to identify any potential disadvantage that arose as a consequence of the course followed’.

must be informed and voluntary.<sup>101</sup> This approach precludes waiver where parties are given no chance at all to be heard.<sup>102</sup> People who receive no notice or chance to put their case would not normally have sufficient knowledge of the case, or key issues, to be capable of waiver. There seems no reason why the principles developed to govern waiver of the bias rule should not inform any possible waiver of the hearing rule and the reasoning in *MH6* illustrates why. The applicant was represented by experienced counsel who raised many procedural queries, including one about the order of the hearing, but did not press any of those queries after they were discussed during the hearing. The Court of Appeal accepted that tactical decisions by counsel, which in that case was a failure to make a timely objection, could amount to waiver by conduct.<sup>103</sup> The Court reasoned that parties could in ‘ordinary circumstances’ expect to be bound to the consequences of the decisions made by their lawyers and other agents.<sup>104</sup>

The instances where this presumption might not apply are limited by the strict approach taken by the High Court to imputing the consequences of the fault of an agent to the party who engaged that agent in *SZFDE*.<sup>105</sup> But outside the sort of glaring fraud of that case, where a migration agent completely deceived his client about the need to lodge any appeal documents, the decisions and errors of an agent will bind the client.<sup>106</sup> This reasoning surely includes the actions of a lawyer or other agent that could support a finding of waiver according to the normal rules of that doctrine.

<sup>101</sup> That approach is consistent with the small number of other cases governing waiver of the hearing rule. See, eg, *Escobar v Spindaleri* (n 40) 62 (Samuels JA in dissent); and *Burwood Municipal Council v Harvey* (1995) 86 LGERA 389, 411–13 (Mahoney JA) (*‘Burwood’*). However, Kirby P stated that ‘a point would be reached where the default was so large, and the departure from orthodox conduct so substantial, that notions of waiver have no application’: at 404–5.

<sup>102</sup> Such a problem was noted in *DWN042 v Republic of Nauru* (2017) 350 ALR 582, 588 [21] where Keane, Nettle and Edelman JJ noted that the parties had received no hearing at all. Justice Edelman referred to this example as ‘an extreme case of denial of procedural fairness’ in *Hossain* (n 1) 148 [72].

<sup>103</sup> *MH6 v Mental Health Review Board* (n 89) 394–5.

<sup>104</sup> *Ibid* 395. This reasoning is consistent with other cases where the party claiming waiver has been required to establish a conscious decision not to pursue a point. See, eg, *Escobar v Spindaleri* (n 40); *In the Marriage of DJ and MY Collins* (1990) 14 FamLR 162, 179; *Thai v Deputy Commissioner of Taxation* (1994) 53 FCR 252, 272; *Burwood* (n 101).

<sup>105</sup> *SZFDE v Minister for Immigration and Citizenship* (2007) 232 CLR 189, 207 (*‘SZFDE’*).

<sup>106</sup> Clients cannot simply evade the mistakes of a negligent, lacklustre or even deceitful lawyer. The key factor is deceit that somehow frustrates the proper operation of the tribunal or other decision maker. See, eg, *SZHVM v Minister for Immigration and Citizenship* (2008) 170 FCR 211 (client bound by migration agent’s unwise advice that he remain home and mind his child rather than attend a tribunal hearing); *Minister for Immigration and Citizenship v SZLIX* (2008) 245 ALR 1 (simple negligence by agent not enough for client to escape the consequences of the agent’s actions); *SZSXT*

VII WAIVER AND THE ENGLISH COURT OF APPEAL: THE *HILL* CASE

The applicant in *R (Hill) v Institute of Chartered Accountants in England and Wales* ('*Hill*') was an accountant facing professional disciplinary charges brought by the Institute of Chartered Accountants in England and Wales.<sup>107</sup> The disciplinary Tribunal was not a court but conducted its hearings in a relatively formal manner, using many of the trappings of curial hearings.<sup>108</sup> The parties were each represented by counsel, who led oral evidence and made detailed submissions. The applicant gave evidence in chief and was cross-examined. One member of the tribunal briefly left the hearing during that cross-examination but did so with the agreement of the applicant's counsel. That member read the transcript of the parts of the hearing he was absent from, then participated in the rest of the hearing. This occurred at the early stage of the applicant's cross-examination, which was interrupted by several adjournments over a six week period.<sup>109</sup> The Tribunal found the charges proved and ordered the applicant be excluded from the Institute. The applicant sought judicial review of the Tribunal's decision on the ground that the Tribunal had breached the rules of natural justice by allowing one of its members to leave part of the hearing but preside in the remainder of the case.

The claim was dismissed by Lang J at first instance, who held that the disciplinary tribunal had the power to authorise a temporary absence of one of its members.<sup>110</sup> Justice Lang relied on a distinction previously drawn by Sedley LJ between adjudicative and constitutive jurisdiction. Lord Justice Sedley explained constitutive jurisdiction as 'the power given to a judicial body to decide certain classes of issue', while adjudicative jurisdiction the entitlement of such a body to 'reach a decision within its constitutive jurisdiction'.<sup>111</sup> Justice Lang held that any possible error by

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*v Minister for Immigration and Border Protection* (2014) 222 FCR 73 (applicant not bound by dishonest statements and actions about crucial procedures by friend who assisted him).

<sup>107</sup> *R (Hill) v Institute of Chartered Accountants in England and Wales* [2014] 1 WLR 86 ('*Hill*').

<sup>108</sup> As administrative officials and bodies generally have a discretion over the procedure they adopt, it is usually permissible for their hearings to vary in the level of formality and the extent to which they utilise inquisitorial or adversarial procedures.

<sup>109</sup> This strangely extended period of cross-examination was due to the other professional commitments of the tribunal members and the applicant, which made it impossible to conduct the hearing over a single unbroken period.

<sup>110</sup> *R (on the application of Hill) v Institute of Chartered Accountants in England and Wales* [2012] EWHC 1731 (QB), [41]–[55] (holding that, while the governing rules did not make express provision for a member to be absent, the inherent power of the tribunal to regulate its proceedings provided sufficient authority). Any consideration of waiver could have been avoided by a contrary finding on this issue because the tribunal's substantive decision would have been vitiated by a lack of power, which would remain unaffected by any waiver.

<sup>111</sup> *Carter v Ahsan* [2005] ICR 1817, [16]. The dissenting view of Sedley LJ was affirmed by the House of Lords in *Watt (formerly Carter) v Ashan* [2008] 1 AC 696.

the disciplinary tribunal had not affected its constitutive jurisdiction, or any other description of the power required to enter and conduct the inquiry that it had.

Although Lang J accepted that the Tribunal had the power to allow the temporary absence of one of its members, her Honour held that it was unfair for the member to leave during most of the cross-examination of the applicant whose credibility was a central issue.<sup>112</sup> It followed, Lang J reasoned, that fairness required the member to observe and assess the applicant's demeanour in person, in order to make a proper judgment of his credibility, rather than reach a judgment on that issue by reading a transcript of what had occurred while the member was absent.<sup>113</sup> But Lang J identified several reasons why that breach had been waived. One was that the applicant was represented by an extremely able lawyer who specialised in professional disciplinary hearings, acted in accordance with the applicant's instructions and made an informed decision not to object to the absence of one tribunal member.<sup>114</sup> Justice Lang rejected arguments that the lawyer had erred in this decision and noted that, even if such an error had been established, longstanding authority meant that the applicant would be bound by the mistake of his lawyer.<sup>115</sup>

There were two other notable features of Lang J's findings on waiver. First, her Honour relied upon cases of waiver of the bias rule in support of the more general proposition that a breach of fairness could be waived.<sup>116</sup> Justice Lang found that the key requirements for waiver of the bias rule — that any waiver be clear and unequivocal, voluntary and made with full knowledge of key relevant facts — were met in the case at hand. The second notable feature of Lang J's findings on bias was that her Honour drew attention to authority suggesting that the rights protected by art 6(1) of the *European Convention on Human Rights* ('ECHR') were capable of waiver so

<sup>112</sup> But Lang J also noted that the inherent flexibility of the requirements of fairness meant there was no rigid rule that decision-makers must always personally observe all evidence: *R (on the application of Hill) v Institute of Chartered Accountants in England and Wales* (n 110) [82]–[87].

<sup>113</sup> *R (on the application of Hill) v Institute of Chartered Accountants in England and Wales* (n 110) [72]–[81]. This finding is consistent with *NAIS v Minister for Immigration and Multicultural and Indigenous Affairs* (2005) 228 CLR 470, where the High Court found that a decision delivered several years after a hearing was unfair because it was unlikely, perhaps even impossible, that the decision maker could recall and assess evidence from many years ago fairly and accurately.

<sup>114</sup> *R (on the application of Hill) v Institute of Chartered Accountants in England and Wales* (n 110) [93]–[95].

<sup>115</sup> *Ibid* [97]–[98]. The case cited for this proposition was *Al-Mehdawi v Secretary of State for the Home Department* [1990] 1 AC 876, 898 (Lord Bridge) ('*Al-Mehdawi*'). Justice Lang noted that *Al-Mehdawi's* notion of liability for the actions of one's lawyers had been found to be unaffected by the incorporation of the ECHR into UK law: *R (Sinha) v General Medical Council* [2008] EWHC 1732 (Admin), [50]–[56]. The High Court of Australia has accepted the rationale of *Al-Mehdawi* but held that it does not extend to cases where the lawyer or agent acting in legal proceedings has engaged in fraud on the tribunal: *SZFDE* (n 105).

<sup>116</sup> The key bias case cited by Lang J was *Locabail* (n 54).

long as any waiver ‘does not run counter to any important public interest’.<sup>117</sup> This reasoning is consistent with that of Edelman J noted above, which suggested that relief for the most extreme breaches of fairness may be required in part to protect the integrity of the legal system.

The Court of Appeal upheld that decision of Lang J but did so on different grounds, finding unanimously that there had been no breach of natural justice. Only Longmore LJ considered the issue of waiver, which his Lordship found would have operated if a breach of natural justice had occurred in the case at hand. Lord Justice Beatson, with whom Underhill LJ agreed, held that the claim was best resolved without consideration of waiver though his reasoning appears to leave open the possibility of waiver of natural justice. Lord Justice Beatson approached the problem at hand by use of what can be described as a distinction of ‘before and after’. His Honour distinguished between these different cases. The first type of case is where a breach of the requirements of fairness had occurred and the question was whether that breach ‘has subsequently been waived by the person affected’.<sup>118</sup> Lord Justice Beatson provided the example of *Locabail*,<sup>119</sup> where the judge disclosed a potentially disqualifying interest on the seventh day of a 16-day hearing. No objection was taken at the time of disclosure or during the nine further hearing days. It was instead made after judgment was delivered. The Court held that the right to complain about bias had been waived because the affected party had failed to make a timely objection after gaining full knowledge of the basis to do so.

The other type of case identified by Beatson LJ were those

where at a stage in the process before there has been any breach of express procedural requirements or the requirements of natural justice, the decision-maker and others involved have discussed a proposed procedure and have freely and in full knowledge of the facts consented to that procedure when it is followed.<sup>120</sup>

Lord Justice Beatson agreed with the judge at first instance, that such cases should be characterised as ones where no unfairness had occurred, rather than as instances of waiver of fairness.<sup>121</sup> His Honour founded this view on some longstanding assumptions about natural justice. One was the description of the requirements of fairness as ‘fair play in action’.<sup>122</sup> Another was the inherent flexibility of fairness, which the courts worked to preserve in part by refusing to lay down detailed or prescriptive

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<sup>117</sup> *R (on the application of Hill) v Institute of Chartered Accountants in England and Wales* (n 110) [105], citing *Pfeifer and Plankl v Austria* [1992] 14 EHRR 692, [37]–[39]; *Bulut v Austria* (1997) 24 EHRR 84, [34]; *Young v United Kingdom* (2007) 45 EHRR 29, [40].

<sup>118</sup> *Hill* (n 107) [43].

<sup>119</sup> *Locabail* (n 54).

<sup>120</sup> *Hill* (n 107) [44].

<sup>121</sup> *Ibid* [44]–[46].

<sup>122</sup> This widely cited description was made by Lord Morris in *Wiseman* (n 7) 309.

requirements.<sup>123</sup> He explained that where ‘a person is offered the opportunity to be heard by a procedure which is fair but declines the offer, it is a distortion of language’ to describe the resulting decision as one containing a breach of fairness that was waived.<sup>124</sup> Lord Justice Beatson was mindful to avoid a descent into technical detail that might serve only to obscure the issues, which he reasoned would be at odds with the absence of details or rigid rules applicable to the tribunal at hand and the flexible approach to questions of fairness which that regime was designed to foster. A related reason was that avoidance of waiver in such cases could relieve courts of the need to consider an ‘arid discussion’ of whether bodies had the power to allow waiver of the hearing rule.<sup>125</sup>

Lord Justice Longmore doubted whether a party who had agreed to a particular procedure, only to complain about it afterwards, could be said to have suffered a denial of natural justice. His Lordship thought that any agreement should bind the parties, so long as the agreement was voluntary, informed and unequivocal. If such an agreement was made, Longmore LJ suggested there was ‘something peculiarly unattractive’ in a party agreeing to the procedure, participating in the hearing and then ‘alleging that the decision has been reached in breach of the rules of natural justice’.<sup>126</sup> Lord Justice Longmore also considered whether any waiver might depend on jurisdictional issues, notably whether any agreement or like conduct that might support waiver could be rendered void because it also took the tribunal beyond its jurisdiction.<sup>127</sup> His Lordship accepted that some errors could take this particular disciplinary tribunal, and presumably any other one, beyond its power to commit an error that could not be overcome by waiver.<sup>128</sup> Lord Justice Longmore held that the claimed error in the case at hand was not of that character because the tribunal’s procedures had to be agreed to and therefore could also be waived.<sup>129</sup>

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<sup>123</sup> The authorities cited by Beatson LJ for this proposition were *R v Monopolies and Mergers Commission; Ex parte Matthew Brown plc* [1987] 1 WLR 1235 and *Lloyd v McMahon* [1987] AC 625, 702. Beatson LJ explained the flexible nature of fairness in more detail in the subsequent case of *R(L) v West London Health NHS Trust* [2014] 1 WLR 3103, [69]–[74]. The flexibility of the requirements of fairness was also affirmed recently by the Privy Council in *Trinidad and Tobago v The Law Association of Trinidad and Tobago (Trinidad and Tobago)* [2018] All ER (D) 95, [39].

<sup>124</sup> *Hill* (n 107) [45].

<sup>125</sup> *Ibid* [50].

<sup>126</sup> *Ibid* [23].

<sup>127</sup> Lord Justice Longmore did not use the terminology of jurisdictional and non-jurisdictional error but instead drew from the distinction Sedley LJ drew between constitutive and adjudicative jurisdiction in *Watt (formerly Carter) v Ashan* [2005] ICR 1817, [16] which appeared like jurisdictional and non-jurisdictional error in all but name.

<sup>128</sup> This reasoning echoes that of Nettle J in *Hossain* (n 1) 137 [40].

<sup>129</sup> *Hill* (n 107) [25].

Lord Justice Longmore also held that an advocate's agreement to such a variation of procedure could 'usually' be relied on by a tribunal or other decision-maker.<sup>130</sup> His Lordship also appeared to accept that waiver of parts of the hearing rule could occur if the circumstances met the requirements governing waiver of the bias rule.<sup>131</sup> When this reasoning was applied to the case at hand, Longmore LJ noted that the questions surrounding the Tribunal's procedure were fairly clear and the applicant's lawyers had been given sufficient time to consider their position during both a short adjournment, when questions first arose, and again during the several weeks over which the truncated cross-examination of the applicant was conducted.<sup>132</sup> Those facts bear some similarity to the *New Price Retail* case discussed above, where the conduct said to give rise to waiver occurred over several weeks, which was held to be a long enough time to allow reflection and decision for the purposes of waiver.

#### VIII WHAT IF SUCH CONDUCT IS NOT CATEGORISED AS A DENIAL OF NATURAL JUSTICE?

The chief consequence of waiver of the hearing rule, or one of its elements, is that an affected person cannot complain of conduct that would otherwise vitiate a decision. Could and should that possibility extend to other categories of legal error in public law proceedings? This question was considered briefly by the Full Court of the Federal Court of Australia in *MZZMG v Minister for Immigration and Border Protection*.<sup>133</sup> The main question in that case was whether the Refugee Review Tribunal ('RRT') had erred in the conduct of a joint hearing of the asylum claims of two brothers by taking the evidence of each brother in the absence of the other. The procedure was notified to each brother well in advance of the hearing, agreed to by their migration agent before the hearing and not subject to any objection by the brothers or their agent during the hearing.<sup>134</sup> The Full Court dismissed the brothers' appeals, holding that the procedure adopted was within the scope of the discretionary power granted to the RRT to gather evidence. Although the Full Court held that the RRT had not fallen into jurisdictional error, it concluded its reasons with a brief consideration of the discretionary factors governing relief if jurisdictional error had been established. The Minister submitted that relief could be refused because of 'the appellant's acquiescence in the procedure by which the Tribunal held a joint review hearing and foreshadowed that it would exclude each of the brothers at some stage'.<sup>135</sup> That submission sounds like waiver by another name — though, as is typical of claims of acquiescence, the consent of the affected party was given in advance.

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<sup>130</sup> Ibid [50].

<sup>131</sup> Ibid [34]–[37].

<sup>132</sup> Ibid [36].

<sup>133</sup> (2015) 234 FCR 180.

<sup>134</sup> Ibid 183–4 [9]–[15].

<sup>135</sup> Ibid 196 [68].

The finding of the Full Court that no jurisdictional error had occurred meant that it did not strictly need to determine any question of acquiescence but the Court nonetheless suggested that

at the level of general principle, it will be a rare case where a decision of an administrative tribunal found to be without, or in excess, of that tribunal's jurisdiction is allowed to stand, and to affect the rights of a person, for reasons based on discretionary considerations such as delay or 'acquiescence' in a process before the tribunal which the Court has found to be unlawful.<sup>136</sup>

The position of the Full Court reflects a wider reluctance in Australian cases to refuse relief on discretionary grounds when jurisdictional error is established.<sup>137</sup> In my view, however, that reasoning can be said to elevate form over substance. If parties have waived a procedural right or benefit, and done so willingly, there is surely a strong case to refuse relief on discretionary grounds for reasons of common sense and also to ensure that, in rare cases where waiver is clear, the procedures of courts and tribunals are not cynically misused. That said, the cautions of the Full Court reflect those expressed by Longmore LJ on whether any operation of waiver might depend upon (or be limited by) questions of whether the legal error that arose from the relevant conduct caused the tribunal or other body to go beyond its jurisdiction. Even if that possibility applies, conduct amounting to waiver can surely weigh heavily in the exercise of the discretion, if any is available, to refuse relief.

## IX CONCLUDING OBSERVATIONS

The possibility of waiver of the hearing rule has a counterintuitive quality. How can a hearing be fair if basic aspects of fairness are not observed? This article has answered that question with a two-fold argument.

One reflects the dignitarian approach that gained favour with the Supreme Court in *Osborn*. If we accept that fairness requires that 'due respect' be paid to people affected by administrative processes, respectful treatment must surely include the ability of people to say no. Put another way, dignitarian values are not fostered if people are forced to endure an entire hearing, or procedures within a hearing, that they have either expressly rejected or impliedly refused by their conduct.

This dignitarian rationale aligns with the emphasis Australian courts place on opportunity in natural justice, which draws attention to the second and practical argument

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<sup>136</sup> Ibid 196–7 [69].

<sup>137</sup> The authority cited for this proposition was *Re Refugee Review Tribunal; Ex parte Aala* (2000) 204 CLR 82, 107–10 [55]–[62] (Gaudron and Gummow JJ). The Australian approach to the refusal of judicial review remedies on discretionary grounds is explained in Aronson, Groves and Weeks (n 2) ch 17. See also Janina Boughey, Ellen Rock and Greg Weeks, *Government Liability: Principles and Remedies* (LexisNexis, 2019) 155–8.

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in favour of the possibility of waiver of the hearing rule. Natural justice requires that affected people be given a fair chance or opportunity to put forward their claims. This chance or opportunity need not actually be used and one can understand why. A hearing does not become unfair if people affected by the administrative process choose not to avail themselves of one, or even all, of the rights that may flow from the duty to observe the rules of natural justice. The requirements of fairness are satisfied if people receive a real and meaningful chance to know the case against them and to put their own case. Fairness does not and should not require that people be forced to attend a hearing, make submissions or exercise any other basic procedural rights if they do not want to. This position preserves the autonomy of affected people. It also ensures that the procedural obligations imposed upon decision-makers have reasonable limits. Waiver of natural justice should surely be possible in such cases.



## **‘FAULT LINES’ IN CERTAINTY OF OBJECT FOR PRIVATE TRUSTS: ‘NONE THE WORSE FOR IT’?**

### ABSTRACT

It is well established that the validity of trusts is grounded in, amongst other things, certainty of object. Courts have developed rules, which function in a binary fashion as ‘fault lines’, directed to distinguishing objects that are certain from those that are not. At the same time, instances arise that test the boundaries of these lines. This article probes such instances, on the way to revealing that the concept of certainty of object may be more fluid, and indeed less precise, than may have been imagined. And it ultimately raises the question whether the law should be any the worse for this.

### I SETTING THE SCENE

**I**t has become fashionable, particularly in the equity sphere, to speak of ‘fault lines’.<sup>1</sup> The phrase is intended to invoke a more generic concept than some form of terrestrial fracture caused by the shifting of tectonic plates. It targets any form of division or rift that is prone to triggering confrontation. But it can be conceived more broadly again, to encompass the line dividing two inconsistent outcomes, and specifically where that line is to be drawn, and why. In many ways, the latter represents the ultimate focus of the law. As Oliver Wendell Holmes Jr famously wrote, ‘where to draw the line ... [is] pretty much everything worth arguing in the law’,<sup>2</sup> having some two decades earlier characterised ‘[m]ost distinctions’ as ones of degree and ‘none the worse for it’.<sup>3</sup> In the legal environment the notion of fault lines is, in this sense, nothing revolutionary, reflecting the Biblical adage that there is nothing new under the sun.<sup>4</sup>

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<sup>1</sup> Indeed, a book has been published with this focus: see James Glister and Pauline Ridge (eds), *Fault Lines in Equity* (Hart Publishing, 2012).

<sup>2</sup> *Irwin, Former Collector of Internal Revenue v Gavit*, 268 US 161, 168 (1925).

<sup>3</sup> *Haddock v Haddock*, 201 US 562, 631 (1906).

<sup>4</sup> Ecclesiastes 1:19.

This article probes a 'fault line' in the trusts context. Merely because trusts emanated from the broader equitable jurisdiction, which originally marked itself by its flexibility and discretion as compared to the common law, hardly obviated the need for rules to distinguish one outcome from another. While there were (and arguably remain) instances where equity jurisdiction rests upon the length of the Chancellor's foot, most of the law surrounding express trusts, in particular, is characterised by well-defined rules.

As 'rules' of law serve to draw a (fault) line — so that the outcome differs depending on which side of the line a scenario is declared to fall — they are accordingly inherently binary in nature. Their application dictates either one outcome or another, which by definition differ. And this is notwithstanding that, as Holmes noted above, questions of degree are frequently involved.

For the purposes of this article, the focus is on one of the core rules underscoring the validity of an express trust: certainty of object. Given the prevalence of rules espoused by the general law of trusts, it is certainly not exhaustive of where fault lines emerge. For instance, in inquiring into an intention to create a trust, there is no scope for a court to conclude that a person *partly* intended to create a trust; instead, the law determines whether a trust was intended, or was not. The same applies to the second of the so-called 'three certainties' underscoring the creation of an express trust: certainty of subject matter. Again, either the subject matter of a trust is certain, or it is not. There is no legal concept or validity inhering in *partially* certain trust subject matter. Hence the binary concept mentioned above.

Parallel observations stem from inquiry into the third certainty, namely certainty of object as elaborated in this article. The general law ostensibly acknowledges no such thing as *partial* certainty of object; again, an object is either certain, or it is not. The need for rules to set the fault lines when addressing the three certainties is heightened because, if one of the certainties is lacking, no express trust enters into being; any supposed trust in this instance is said to 'fail'. To this end, 'certainty' assumes value because it aims to define what is, and is not, a trust.

(Un)certainty of intention to create a trust reflects the legal (and social) policy underscoring persons' freedom to dispose of their property on the terms they deem fit. Yet a person can express an intention to declare a trust over property (thus fulfilling certainty of intention) but at the same time fail to identify that property with the requisite certainty. In this event, the intended trust fails for certainty of subject matter. It is similarly conceivable that a person intending to create a trust, and specifies its subject matter with the requisite certainty, may nonetheless be thwarted in that intention by uncertainty of object.

The second and third certainties target the basal aspects of the trust, namely the holding of property (subject matter) for the benefit of another (object). This in turn explains why intention to create a trust is a necessary, *but not sufficient*, element of the trust equation. It ultimately acknowledges, in line with the remarks in the preceding paragraph, that the law does not always give effect to a person's intention when it comes to disposing of their property. In trusts law, the reasons for this are

evident, and focus in the first instance on the obligations of the putative trustee. They must be able to identify, with certainty, the property the subject of the trust, because the way they can (and sometimes must) deal with that property differs vis-à-vis property they hold beneficially. As the property is held (indeed managed) for the benefit of other persons, the trustee must also know, again with certainty, to whom they owe obligations (in equity).

## II DOVETAILING INTO CERTAINTY OF OBJECT

When targeting certainty of object, the foregoing gives effect to assumptions of self-interest inherent in human nature. It presupposes that those with a financial interest in the trust property are motivated, for ‘selfish’ reasons if nothing else, to ensure that the trustee acts in their interests. By virtue of holding legal title, the trustee can (at common law) transact with trust property as they wish. The curb on trustee ‘selfishness’ here is the obligation, imposed by equity, to manage the trust property not for their own benefit, but for the benefit of those who (whether individually or collectively) hold the beneficial (equitable) entitlements thereto. The very fact that, as part of these obligations, fiduciary law proscribes even the prospect of conflict between duty and interest speaks to a concern that self-interest can manifest itself by way of temptation.

Certainty of object nonetheless has a broader remit than reflecting an incident of human nature. Its upshot, commonly termed the beneficiary principle, is driven by the concern espoused by Sir William Grant MR’s classic statement in *Morice v Bishop of Durham*:

There can be no trust, over the exercise of which this Court will not assume a control; for an uncontrollable power of disposition would be ownership, and not trust. If there be a clear trust, but for uncertain objects, the property, that is the subject of the trust, is undisposed of, and the benefit of such trust must result to those, to whom the law gives the ownership in default of disposition by the former owner ... Every ... trust must have a definite object. There must be somebody, in whose favour the court can decree performance.<sup>5</sup>

Reflecting the courts’ longstanding inherent supervisory jurisdiction over trusts — no doubt driven in large part by the relative vulnerability of beneficiaries (objects) to the ‘strong’ position of trustees<sup>6</sup> — his Lordship’s statement contains two main elements: the court must assume control over trusts; and every trust must have a definite object (beneficiary) who can enforce the trust. The two are related: as the court does not take the initiative in the control and enforcement of trusts, there must be a person (with an interest) to bring the matter to the court’s attention. On appeal, Lord Eldon LC explained that the notions of control and enforceability are based

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<sup>5</sup> (1804) 9 Ves 399, 404–5; 32 ER 656, 658.

<sup>6</sup> See *Chief Commissioner of Stamp Duties (NSW) v Buckle* (1998) 192 CLR 226, 234 [9] (The Court) (*‘Chief Commissioner of Stamp Duties’*).

on the possibility that the court might, under the umbrella of inherent jurisdiction, be called upon to step in and administer the trust, or to direct distribution of trust income or capital to a beneficiary.<sup>7</sup>

There are accordingly two aspects of the 'beneficiary principle'. There is the one immediately above evincing the concern that trustees must be held accountable, by the court if need be. Beneficiaries therefore have standing to 'enforce' the trust — in this context reflecting an exception to the equitable maxim that 'equity will not assist a volunteer', a category within which most trust beneficiaries inhabit — again by reference to the court if the trustees resist. By itself, however, this may not fully explain why the law demands 'certainty' of object, in the sense of ascertained or ascertainable beneficiaries. After all, not every beneficiary need be a party to a curial application to enforce the trust. Status as *a* beneficiary, not collective action by the beneficiaries, suffices for standing to this end.

At the same time, certainty plays a role here precisely because standing rests upon status as a beneficiary (and the 'interest' attaching to this status); hence a need to be able to discriminate persons who are beneficiaries from those who are not. There is no middle category in this regard where, assuming certainty of intention and subject matter, a trust may *partially* fulfil certainty of object.

This can in turn present challenges for the courts, given that drawing the (fault) line can, as Holmes acknowledged, involve matters of degree (or, expressed another way, inquiry along a continuum). With this backdrop, this article elaborates three scenarios where the ostensibly strict application of certainty of object has been relaxed by courts: certainty of object for fixed trusts, for discretionary trusts, and in distinguishing purpose from individual trusts. And while these have eschewed an intermediate category of partial certainty, their upshot in shifting what may be perceived as potentially uncertain into the 'certain' side of the (fault) line may belie the suggestion that they have not, at least in some way, loosened the dictates of certainty. These scenarios, which represent the substance of the article, may trigger a (re)consideration of what is meant by 'certainty' of object.

### III FIXED TRUSTS

#### A *The Certainty Rule*

It is well established that certainty of object for fixed trusts is governed by the 'list certainty' test. What marks a fixed trust is that its beneficiaries have an (equitable) fixed entitlement to the capital and/or income of the trust, which courts have characterised in (equitable) proprietary terms. Beneficiaries can accordingly call for, and enforce the distribution of, that entitlement. It stands to reason that, to fulfil the certainty of object requirement, the trustee must be able to ascertain (that is, list) all of the beneficiaries at least when it comes to the time of distribution. If the

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<sup>7</sup> *Morice v Bishop of Durham* (1805) 10 Ves 522, 539–40; 32 ER 947, 954.

trustee can only ascertain some of the beneficiaries at that time, part of the equitable interest in the capital and/or income at that time remains unallocated. This would in turn conflict with the law's policy against gaps in (beneficial/equitable) ownership of property, and threaten oversight vis-à-vis the unallocated income/capital. The latter, in line with earlier observations, misaligns with the prospect of the matter being brought to the court's attention for control and enforcement.

Commonly cited as a leading case in support of the 'list certainty' approach, *Inland Revenue Commissioners v Broadway Cottages Trust* actually involved what was, for all intents and purposes, a discretionary trust.<sup>8</sup> It retains its relevance in this context because, at the time, the same test for certainty of object applied whether the trust was fixed or discretionary in nature. For discretionary trusts, this subsequently changed, a point elaborated later in the article. The case involved a trust to apply income for the benefit of all or any of a class of beneficiaries specified in the Schedule to the trust deed 'in such shares proportions and manner as the trustees in their discretion from time to time think fit'. The Schedule referred, inter alia, to the following persons by way of clauses 1 and 2:

1. All persons (other than the settlor and any wife of his and any infant child of his) who have been in the past or (as the case may be) at the date of these presents or subsequently thereto at any time during the period ending on December 31, 1980, or during the appointed period whichever shall be the shorter employed by:— (a) the settlor; (b) the wife of the settlor; (c) William Timpson deceased (father of the settlor and who died on January 20, 1929); (d) Katherine Chapman Timpson deceased (mother of the settlor and who died on December 16, 1940); (e) William Timpson Limited or by any other limited company which may succeed to the business of William Timpson Limited; (f) any other limited company of which the settlor is a director at the date of these presents.
2. The wives and widows of any such persons as is specified in cl 1 of this schedule.<sup>9</sup>

Given the wide scope of clauses 1 and 2 above, it was conceded that the persons who constituted 'the beneficiaries' comprised an aggregate of objects incapable of ascertainment, in the sense that it would be impossible at any given time to achieve a complete and exhaustive enumeration of those who qualified as 'beneficiaries'. At the same time, it was similarly conceded that the qualifications for inclusion in the beneficiary class were sufficiently precise to make it possible to determine with certainty whether or not any particular individual was a member of the class.

Lord Justice Jenkins, who delivered the reasons of the English Court of Appeal, expressed 'some sympathy' for the argument that the latter should suffice to substantiate certainty of object in the circumstances. His Lordship's sympathy emanated

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<sup>8</sup> [1955] Ch 20 ('*Broadway Cottages*').

<sup>9</sup> *Ibid* 23–4.

from what he perceived as ‘an attractive air of common sense’ underscoring that argument.<sup>10</sup> Yet his concern was that, by reason of an inability to make a complete list of beneficiaries, the trust was not one that the court could control or execute, even if curial assistance ever becoming necessary was improbable.<sup>11</sup>

While the same would not have been the outcome had the case been decided after *McPhail v Doulton*<sup>12</sup> — which as discussed below obviated the list certainty test for discretionary trusts, instead aligning the relevant inquiry with that applicable to mere powers<sup>13</sup> — the latter did not purport to alter the list certainty approach in its application to fixed trusts. Hence, the following statement by Jenkins LJ in *Broadway Cottages* remains extant:

a trust to divide the income of the trust fund during the appointed period amongst a class consisting of the settlor’s wife and all the beneficiaries for the time being living or in existence, and if more than one in equal shares, would ... have been void for uncertainty.<sup>14</sup>

### B *The Rule Relaxed?*

In Australian law, the list certainty test espoused in *Broadway Cottages* may prove less strict in its application to fixed trusts than may appear at first sight, at least if Young J’s decision in *West v Weston* is any indicator of its possible trajectory.<sup>15</sup> The case involved a testamentary gift ‘[t]o divide the balance then remaining equally (per capita) amongst such of the issue living at my death of my four grandparents ... as attain the age of twenty-one (21) years’.<sup>16</sup> Difficulties arose because it was practically impossible to make a complete list of these persons as at the time of the testator’s death. Yet the testamentary language — in its use of the phrase ‘divide ... equally’ — mandated that each beneficiary take an equal share. Genealogical inquiries had, at the time of the hearing, identified some 1,675 beneficiaries who could take a share of the balance. His Honour conceded that ‘[a]lthough the law of diminishing returns will now apply, it is possible that more claimants will come to light even though the executrix and the genealogist have now been searching for some two years’.<sup>17</sup>

This in turn suggested a lengthy and potentially expensive process of identifying (further) beneficiaries. Against this backdrop, Young J considered that the strict ‘list certainty’ approach should be modified, opining that ‘a court of equity must always

<sup>10</sup> Ibid 35.

<sup>11</sup> Ibid.

<sup>12</sup> [1971] AC 424 (*McPhail*).

<sup>13</sup> Cf *Broadway Cottages* (n 8) 36 (Jenkins LJ). His Lordship spoke against ‘a valid power [being] spelt out of an invalid trust’.

<sup>14</sup> Ibid 29.

<sup>15</sup> (1998) 44 NSWLR 657 (*West*).

<sup>16</sup> Ibid 658.

<sup>17</sup> Ibid 659.

be on the *qui vive* to realise that community circumstances have changed.’<sup>18</sup> The changes his Honour had in mind included the following:

these days, being married is not a necessary prerequisite to having children. Even married persons may give the child a surname other than the father’s surname. Unmarried persons who produce a child often call the child by the mother’s surname. In remote areas and some Aboriginal communities births are not always registered. All these factors produce greater uncertainties than would have been the case when the rules as to certainty were laid down.<sup>19</sup>

In other words, evidential difficulties — which the House of Lords had a quarter of a century earlier viewed as not undermining certainty of object<sup>20</sup> — could translate from the procedural to the substantive when it comes to the validity of trusts.<sup>21</sup> In view of these difficulties, Young J perceived a justification in ‘slightly modifying’ the operation of the ‘list certainty’ rule ‘for Australian conditions of the present day’ to read as follows:

The rule will be satisfied if, within a reasonable time after the gift comes into effect, the court can be satisfied on the balance of probabilities that the substantial majority of the beneficiaries have been ascertained and that no reasonable inquiries could be made which would improve the situation.<sup>22</sup>

This represented ‘good equity and good sense’, his Honour surmised, as ‘[e]quity does not make a rule just for the sheer fun of making a test, but it must have a purpose’.<sup>23</sup> He saw the purpose of the list certainty rule as, in modern conditions, just as well catered for by the above modification as in its original form. Indeed, Young J remarked, it was ‘better accommodated’ because, on the facts before the Court,

instead of the testator’s intention being completely frustrated and the money passing as *bona vacantia*, at least 1,675 people who can be ascertained and do fit

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<sup>18</sup> Ibid 663.

<sup>19</sup> Ibid 664.

<sup>20</sup> ‘[I]f the class is sufficiently defined by the donor the fact that it may be difficult to ascertain the whereabouts or continued existence of some of its members at the relevant time matters not. The trustees can apply to the court for directions or pay a share into court’: see *Re Gulbenkian’s Settlements* [1970] AC 508, 524 (Lord Upjohn) (*Re Gulbenkian’s Settlements*). See also *Lempens v Reid* (2009) 2 ASTLR 373, 377–8 [21] (Gray J) (*Lempens*).

<sup>21</sup> Cf RP Austin, ‘Discretionary Trusts: Conceptual Uncertainty and Practical Sense’ (1980) 9(1) *Sydney Law Review* 58. Austin maintains a confluence between semantic and evidential uncertainty issues.

<sup>22</sup> *West* (n 15) 664.

<sup>23</sup> Ibid.

within the description will benefit as the testator intended notwithstanding that it might not be possible to make a complete list with certainty.<sup>24</sup>

In view of the extensive genealogical inquiries made to date, his Honour envisaged that the risk of other beneficiaries ‘coming out of the woodwork’ could be addressed by publishing advertisements in a national newspaper and the executrix taking out insurance against missing beneficiaries (if insurance of this kind remained available).<sup>25</sup> Although his Honour made no specific reference to this point, it may be noted that, if 1,675 persons could be identified as beneficiaries, each would have been entitled to less than \$300 (the net estate totalling around \$500,000), not a substantial sum by any means. One may ponder whether Young J would have pursued the same solution had the sums in question been much more substantial.

Justice Young in *West* did not seek to create a new category of partial uncertainty straddling (list) certainty and uncertainty, which itself would have been productive of uncertainty. Instead, while conceding in the above quote that ‘it might not be possible to make a complete list with certainty’, he purported to mitigate the strictures surrounding the list certainty test so as to locate what would otherwise have been punctuated by uncertainty within the (list) certainty fold. In so doing, he adopted essentially utilitarian reasoning, by contrasting the utility in giving effect to testamentary intention (that would benefit at least 1,675 persons) with that of frustrating it (wherein every such person would be denied a claim). In other words, his Honour evinced marked discomfort with an outcome where, contrary to the testator’s intention, members of an extensive class of beneficiaries would miss out entirely merely because of (potential) minimal remnants of uncertainty as to their class. Not only would they miss out, their share would, given the lack of next-of-kin, likely accrue to the Crown as ownerless goods, an outcome the law is generally loathe to countenance. After all, few testators or donors would, absent specific direction to this effect, wish their estate to be devoted to the Crown.

Clearly, there would have been no need for Young J to modify the certainty test had some element of discretion vested in the trustees of the estate in question. In that event, the sympathy espoused by Jenkins LJ in *Broadway Cottages* mentioned earlier, which as discussed below witnessed fruition in *McPhail*, may have come to the fore. At the same time, it cannot be denied that *West* involved unusual facts, sufficiently so to have generated little curial need to probe the parameters of the modified test in the ensuing two decades or so.<sup>26</sup> Unusual facts, moreover, are not

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<sup>24</sup> Ibid 664–5.

<sup>25</sup> Ibid 665–6.

<sup>26</sup> *West* was applied, without analysis, by Ross J in *Re Estate of Meyerstein* (2009) 4 ASTLR 180. Some other cases have cited *West*, but by reference to Young J’s mention (at 662) of the traditional English practice surrounding inquiry into next-of-kin, involving an order for an advertisement to be published calling for potential claimants, specifying that those who do not come forward and substantiate their claim will be excluded from the benefit of any subsequent order of the court: see, eg, *Re Application by NSW Trustee and Guardian* [2012] NSWSC 1532, [11] (Hallen J); *Re NSW Trustee*

always prone to making good law. This has in turn prompted a commentator to query the legitimacy (and ultimate applicability) of the test espoused in *West*, in particular the scope for difficulty in objectively measuring ‘the substantial majority’ of the beneficiaries.<sup>27</sup> After all, as ‘substantial’ is something upon which reasonable minds may disagree — invoking as it does inquiries of degree — the spectre of uncertainty is raised. And there is the attendant concern that it can undermine the very nature of a fixed trust, and require the court when approached to essentially authorise trustee behaviour inconsistent with its terms.

Moreover, although Young J sought to justify ‘slightly modifying’ the list certainty rule to take into account ‘Australian conditions of the present day’, it may be queried whether those conditions are truly unique or endemic to modern Australia. It should not be assumed that inaccurate registration of births, or use of different surnames, is a phenomenon confined to modern Australia, or even modern times. If anything, it can be logically surmised that the accuracy of birth records has improved in time, in Australia as in most comparable nations. And earlier times certainly saw (especially illegitimate) children being named other than according to their father’s, or even mother’s, surname.<sup>28</sup> Again, this is no new phenomenon.

Be that as it may, *West* reveals a judicial acknowledgement that the element of ‘certainty’ underscoring the list certainty test has the capacity for at least some flexibility. It also reveals a judicial sensitivity to giving effect, to the extent possible, to evident testamentary intention, and in so doing not allowing ostensibly strict rules of certainty to frustrate that intention.

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*and Guardian* [2015] NSWSC 1529, [5]–[6] (Hallen J). In the latter case, as well as in *Application by NSW Trustee and Guardian* [2019] NSWSC 340, [11]–[14] (Henry J), the respective judges viewed the *West* approach as applicable to a ‘Benjamin order’ (named after the order made by Joyce J in *Re Benjamin; Neville v Benjamin* [1902] 1 Ch 723 (*Benjamin*)) — namely an order for the distribution of the estate to persons known to be entitled but without prejudice to the entitlement of any other eligible persons, who later might be located or identified, to then make a claim and be entitled to trace the funds that had been distributed — although Young J made no explicit reference to *Benjamin* in his judgment. In another case where *West* saw mention, *Prosper v Wojtowicz* [2005] QSC 177, [33]–[35] (Wilson J), it was held inapplicable in the face of evidential difficulties in ascertaining the identity of beneficiaries, which do not by themselves undermine the validity of a trust.

<sup>27</sup> See Peter Creighton, ‘Certainty of Objects of Trusts and Powers: The Impact of *McPhail v Doulton* in Australia’ (2000) 22(1) *Sydney Law Review* 93, 96–9.

<sup>28</sup> Although it may be conceded that historically illegitimate children did not take under ‘child’, ‘issue’ or ‘next-of-kin’ testamentary descriptors absent a clear(er) indication to this effect: *Hill v Crook* (1873) LR 6 HL 265; *Dorin v Dorin* (1875) LR 7 HL 568.

## IV DISCRETIONARY TRUSTS

A *The Certainty Rule*

The term ‘discretionary trust’, the High Court has remarked, is ‘used to describe particular features of certain express trusts’.<sup>29</sup> The main such features are that its trustees commonly enjoy discretion to select who in the designated class of potential beneficiaries is to receive any benefit, and to decide the amount of any benefit to be paid. This impacts on both the entitlement of the trust’s beneficiaries and the obligations of its trustees, making it unsurprising that it should translate to how the law couches the relevant test for certainty of object.

That beneficiaries of discretionary trusts, like their fixed trust counterparts, clearly possess standing to enforce the trustees’ obligations under the trust pursuant to the ‘beneficiary principle’ — were it otherwise, the trustees could deal with the trust property in their own interests (‘selfishly’) — is not to confer upon them any individual proprietary interest in the trust income or capital.<sup>30</sup> They accordingly cannot demand a trust distribution in their favour, which rests upon an exercise of the trustees’ discretion, conferred by the trust deed. The beneficiaries, as a result, have no more than a hope or expectation that the trustees will exercise the discretion in their favour.

This in turn explains why there is no need for the trustees of a discretionary trust to make a complete list of (potential) beneficiaries when it comes to the proper exercise of discretion to distribute (sometimes termed ‘appoint’). All that trustees must do is exercise the discretion in good faith, with a real and genuine consideration, and for the purposes for which it was conferred.<sup>31</sup> A discretion is qualitatively distinct from a compulsion, which applies in the fixed trust scenario, namely a compulsion to make a distribution according to the fixed entitlements of the beneficiaries.

The above distinctions between trustee obligation (versus discretion) and beneficiary entitlement (versus hope or expectation) were primary motivators for a majority of the House of Lords in *McPhail* to shelve the list certainty test when it came to discretionary trusts.<sup>32</sup> The trust deed there established a fund, the income from which was to be applied ‘in making at [the trustees’] absolute discretion grants to or for the benefit of any of the officers and employees or ex-officers or ex-employees of the

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<sup>29</sup> *Chief Commissioner of Stamp Duties* (n 6) 234 [8] (The Court).

<sup>30</sup> *Gartside v Inland Revenue Commissioners* [1968] AC 553, 607 (Lord Reid), 615 (Lord Wilberforce).

<sup>31</sup> *Karger v Paul* [1984] VR 161, 164 (McGarvie J).

<sup>32</sup> *McPhail* (n 12) 456 (Lord Wilberforce). They were not, however, the only drivers to this end. Their Lordships’ determination was facilitated by adopting a more flexible approach to applying the equitable maxim ‘equality is equity’: at 451–3 (Lord Wilberforce). Preceding *McPhail*, the basis for requiring list certainty for trust powers was that, should the donee/trustee not appoint the property, the court would do so in their stead. Application of the above maxim dictated that the court equally divided the

company or to any relatives or dependants of any such persons ...' (cl 9(a)). Another sub-clause provided that the trustees were not 'bound to exhaust the income of any year or other period in making such grants ...' (cl 9(b)) and, to reiterate the effect of cl 9(a), under cl 10 '[a]ll benefits being at the absolute discretion of the trustees, no person shall have any right title or interest in the fund otherwise than pursuant to the exercise of such discretion ...'.<sup>33</sup> It was accepted that the class of beneficiaries in cl 9(a) was incapable of reduction to a list, meaning that, if the *Broadway Cottages* approach applied, the trust would fail for lack of certainty of object.

In reaching the conclusion that the list certainty test did not govern a discretionary trust, a majority of the House of Lords compared the discretion as to appointment under a discretionary trust to that under what the law recognises as a 'mere power'. The latter, which need not be confined to the holder of property to which the power attaches, vests in its donee a complete discretion as to whether *or not* to exercise the power. When referring to a discretionary trust (sometimes termed a 'trust power'), while there is likewise a discretion (in a trustee), the relevant language 'imposes a clear duty ... to distribute the fund amongst some at least of the specified class of potential beneficiaries, the discretion conferred ... extending merely to selection and not to deciding whether or not to select'.<sup>34</sup> This in turn translates to what Lord Upjohn in *Re Gulbenkian's Settlements*, the leading 'modern' mere powers case, explained as the 'basic difference' between a mere power and a trust power, namely

that in the [mere power scenario] trustees owe no duty to exercise it and the relevant fund or income falls to be dealt with in accordance with the trusts in default of its exercise, whereas in the [trust power scenario] the trustees must exercise the power and in default the court will.<sup>35</sup>

To this end, both the beneficiaries of a discretionary trust and the objects of a mere power have no more than a hope or expectancy of a distribution in their favour. Neither can compel the trustee or donee to exercise the discretion or power in their favour. The difference comes down to whether or not the discretion must be exercised. Critically, the law had before *Re Gulbenkian's Settlements* accepted that certainty of object for mere powers rested on fulfilling 'criterion certainty', namely that the donor specified a criterion capable of certain application by the donee in exercising the power.<sup>36</sup> In effect, this was the test (unsuccessfully) pressed upon the English Court of Appeal in *Broadway Cottages* vis-à-vis the discretionary trust in that case.

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property between the class of objects, thus requiring knowledge of the identity of each such object (ie list certainty). *McPhail* veered from the equal division approach in curial appointment, thereby obviating the need for list certainty.

<sup>33</sup> Ibid 447.

<sup>34</sup> *Re Leek (deceased)* [1967] Ch 1061, 1073 (Buckley J).

<sup>35</sup> *Re Gulbenkian's Settlements* (n 20) 525.

<sup>36</sup> It may be noted, however, that this did not appear to be settled from early times. In *Re Gulbenkian's Settlements*, Lord Upjohn saw it as 'curious that there is no long line of decided cases as to what is the proper test to apply when considering the validity of a mere power when the class of possible appointees is or may be incapable of

Lord Wilberforce, with whom Lord Reid and Viscount Dilhorne concurred, delivered the majority judgment in *McPhail*. Setting the scene for the outcome were his Lordship’s initial observations as to it being ‘striking how narrow and in a sense artificial is the distinction, in cases such as the present, between trusts or as the particular type of trust is called, trust powers, and powers’, such that ‘[a] layman and, I suspect, also a logician would find it hard to understand what difference there is’.<sup>37</sup> This prompted the observation that ‘[i]t does not seem satisfactory that the entire validity of a disposition should depend on such delicate shading’,<sup>38</sup> before adding that the distinction ‘appears even less significant’ in considering ‘how in practice reasonable and competent trustees would act, and ought to act, in the two cases’.<sup>39</sup> His Lordship illustrated the latter point as follows:

A trustee of an employees’ benefit fund, whether given a power or a trust power, is still a trustee and he would surely consider in either case that he has a fiduciary duty: he is most likely to have been selected as a suitable person to administer it from his knowledge and experience, and would consider he has a responsibility to do so according to its purpose. It would be a complete misdescription of his position to say that, if what he has is a power unaccompanied by an imperative trust to distribute, he cannot be controlled by the court unless he exercised it capriciously, or outside the field permitted by the trust ... Any trustee would surely make it his duty to know what is the permissible area of selection and then consider responsibly, in individual cases, whether a contemplated beneficiary was within the power and whether, in relation to other possible claimants, a particular grant was appropriate.<sup>40</sup>

While Lord Wilberforce did not in so doing purport to equate trust powers and mere powers — he countenanced that a distinction ‘would seem to lie in the extent of the survey which the trustee is required to carry out: if he has to distribute the whole of a fund’s income, he must necessarily make a wider and more systematic survey than if his duty is expressed in terms of a power to make grants’<sup>41</sup> — but to emphasise that

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ascertainment’: *ibid* 521. His Lordship found authority to this effect in the decision of Clauson J in *Re Park* [1932] 1 Ch 580. See also *Re Gestetner Settlement* [1953] Ch 672, 684 (Harman J). Justice Harman remarked that in the case of a mere power — there described as ‘a power collateral, or a power appurtenant, or any of those powers which do not impose a trust upon the conscience of the donee’ — ‘I do not think that it can be the law that it is necessary to know of all the objects in order to appoint to one of them. If that were so, many appointments which are made every day would be bad.’

<sup>37</sup> *McPhail* (n 12) 448.

<sup>38</sup> *Ibid* 449.

<sup>39</sup> *Ibid*.

<sup>40</sup> *Ibid*.

<sup>41</sup> *Ibid*. In a concluding and ostensibly obiter observation, Lord Wilberforce also envisaged that what he termed ‘administrative uncertainty’ could prejudice trust powers but not mere powers: at 457. His Lordship’s remarks here were expressed tentatively, namely that ‘[t]here *may* be a third case where the meaning of the words used is clear but the definition of beneficiaries is so hopelessly wide as not to form

any differences were insufficient in substance to apply discrete tests of certainty of object. This prompted his Lordship to express the following opinion:

we are free to review the *Broadway Cottages* case. The conclusion which I would reach, implicit in the previous discussion, is that the wide distinction between the validity test for powers and that for trust powers is unfortunate and wrong, that the rule recently fastened upon the courts by [*Broadway Cottages*] ought to be discarded, and that the test for the validity of trust powers ought to be similar to that accepted by this House in *In re Gulbenkian's Settlements* for powers, namely, that the trust is valid if it can be said with certainty that any given individual is or is not a member of the class.<sup>42</sup>

In *Re Gulbenkian's Settlements* Lord Reid, in this vein, had expressed the test in terms that '[i]f the classes of beneficiaries are not defined with sufficient particularity to enable the court to determine whether a particular person is or is not, on the facts at a particular time, within one of the classes of beneficiaries, then the power must be bad for uncertainty'.<sup>43</sup> Having determined the appropriate test to apply, the House of Lords in *McPhail* then remitted the case to the Chancery Division for determination whether, on the basis of the test so prescribed, cl 9(a) was valid.<sup>44</sup> On appeal from the Chancery Division, the English Court of Appeal in *Re Baden's Deed Trusts [No 2]*<sup>45</sup> upheld the validity of the clause. Even though the judgments had their differences, broadly speaking its upshot was that the criteria prescribed thereunder — 'officers', 'employees', 'ex-officers', 'ex-employees' or 'relatives' or 'dependants' of such persons — fulfilled the criterion certainty test. In other words, it was possible for the trustees (and thus the Court) to determine with certainty whether or not a person was an 'officer', 'employee', 'ex-officer' or 'ex-employee' of the company in question, and also whether or not they were a 'relative' or 'dependant' thereof. Records of

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"anything like a class" so that the trust is administratively unworkable' (emphasis added). This tentativeness translated to a hesitation to give examples 'for they may prejudice future cases', although he added that 'perhaps "all the residents of Greater London" will serve'. His Lordship proceeded to disclaim any notion that a discretionary trust for 'relatives' of a living person falls within this category. There is little that is genuinely probative in the subsequent case law to give administrative uncertainty any greater precision, and indeed occasions where some confusion surfaces as to its role as distinct from semantic uncertainty: see, eg, *Crawford v Phillips* [2018] 3 NZLR 247, 257–8 [37]–[42] (Asher J for the Court), as well as the discussion in Geraint Thomas, *Thomas on Powers* (Oxford University Press, 2nd ed, 2012) 492–8. There is, in any event, no suggestion in Lord Wilberforce's tentative reference to 'administrative uncertainty' that sought to upset the binary inquiry underscoring *semantic* uncertainty.

<sup>42</sup> *McPhail* (n 12) 456 (citations omitted).

<sup>43</sup> *Re Gulbenkian's Settlements* (n 20) 518. See also Lord Upjohn, 'a mere or bare power of appointment among a class is valid if you can with certainty say whether any given individual is or is not a member of the class; you do not have to be able to ascertain every member of the class': at 521.

<sup>44</sup> *McPhail* (n 12) 450.

<sup>45</sup> [1973] Ch 9 ('*Re Baden's Deed Trusts [No 2]*').

company officers and employees existed, from which the identity of potential beneficiaries could be gleaned, to be distinguished from persons outside that class.

The Court had little difficulty in interpreting ‘relatives’ as ‘blood relations’, again capable of being differentiated from persons who were not ‘relatives’.<sup>46</sup> After all, a longstanding line of case authority involving wills interpreted the term in this fashion.<sup>47</sup> As ‘dependants’ was ‘a word used over several generations in comparable trust deeds’, Sachs LJ opined that ‘the suggestion that it is uncertain seems no longer arguable’.<sup>48</sup> His Lordship referred, moreover, to the use of that term in statute, which courts have been able to define with the certainty needed for its statutory application. Implicit in this observation is that a term capable of definition with certainty in a statutory context should not be viewed as uncertain in a private disposition of property. (Indeed, it may be argued that the certainty threshold for statute should exceed that in trusts and wills).

Hence the discretionary trust in *McPhail* was ultimately held to fulfil the criterion certainty test (and thus exhibit ‘semantic’ or ‘linguistic’ certainty in the words of Lord Wilberforce), in that the criteria specified could be the subject of certain application. A dividing line could be drawn between those who came within the criteria, and those who fell outside it. Terms such as ‘officer’, ‘employee’, ‘relative’ and ‘dependant’ meet the certainty threshold precisely because they are amenable to setting objectively clear dividing lines and in so doing avoiding matters of degree.

It is curious that, even though *McPhail* is approaching its 50<sup>th</sup> anniversary, the High Court of Australia has yet to explicitly rule on the application of the criterion certainty test in relation to trust powers.<sup>49</sup> Having said that, as multiple lower court judgments endorse its correctness in Australian law,<sup>50</sup> and a contrary conclusion would threaten the validity of literally thousands of trusts that have been created and operate upon

<sup>46</sup> Ibid 21–2 (Sachs LJ), 22–3 (Megaw LJ), 29–30 (Stamp LJ).

<sup>47</sup> See, eg, *Re Lanyon* [1927] 2 Ch 264, 267 (Russell J); *A-G (Vic) v Commonwealth* (1962) 107 CLR 529, 545 (Dixon CJ). The same may be said, incidentally, of terms such as ‘child(ren)’, ‘issue’, ‘next-of-kin’, ‘descendants’, ‘heirs’, ‘nephews/nieces’ or even ‘family’, which likewise have attracted prima facie meanings in testamentary instruments: see generally Gino E Dal Pont, *Interpretation of Testamentary Documents* (LexisNexis Butterworths, 2019) ch 7.

<sup>48</sup> *Re Baden’s Deed Trusts [No 2]* (n 45) 21. See also at 30 (Stamp LJ).

<sup>49</sup> The best that can be said is that in *Registrar of the Accident Compensation Tribunal v Federal Commissioner of Taxation* (1993) 178 CLR 145, three members of the High Court referred to *McPhail* with apparent approval, although not strictly in relation to the test for certainty: at 183.

<sup>50</sup> See, eg, *Horan v James* [1982] 2 NSWLR 376, 382 (Glass JA), 383–4 (Mahoney JA); *Herdegen v Federal Commissioner of Taxation* (1988) 84 ALR 271, 277 (Gummow J); *McCracken v A-G (Vic)* [1995] 1 VR 67, 71 (Phillips J) (*‘McCracken’*); *Re Blyth* [1997] 2 Qd R 567, 576 (Thomas J); *Commissioner of State Revenue v Viewbank Properties Pty Ltd* (2004) 55 ATR 501, 509 [20] (Nettle J). See further Creighton (n 27) 99–103.

its foundation, it would be most unlikely for the High Court to rule to the contrary.<sup>51</sup> The upshot of *McPhail*, after all, was to animate the modern discretionary trust, freeing it from the strictures of the list certainty test underscoring fixed trusts.

### B *The Rule Relaxed?*

While *McPhail* may, by loosening the certainty requirement, have broadened the scope for operation of discretionary trusts, it clearly did not upset the need for certainty of object. That the classes of beneficiaries involved in the case were found to have fulfilled the criterion certainty test did not, on the face of Lord Wilberforce's speech, herald an 'open door' policy to *any* criterion. Implicit in his Lordship's speech (and in its factual application in *Re Baden's Deed Trusts*) is that not all criteria necessarily fulfil the criterion certainty test, but only those amenable to a definition capable of clearly dividing objects coming within the criterion from those that fall outside it.

On this basis, therefore, it could rationally be surmised that a criterion such as 'friends' — or, for that matter, 'mates', 'colleagues', 'associates', 'comrades', 'supporters' or 'companions' — is unlikely to fulfil the criterion certainty test (that is, it will be semantically uncertain) unless the terms of the relevant disposition adopt language capable of giving this descriptor scope for objectivity in its application. Here reference may be made to the famous words of Lord Upjohn in *Re Gulbenkian's Settlements*:

Suppose the donor directs that a fund be divided equally between 'my old friends', then unless there is some admissible evidence that the donor has given some special 'dictionary' meaning to that phrase which enables the trustees to identify the class with sufficient certainty, it is plainly bad as being too uncertain. Suppose that there appeared before the trustees (or the court) two or three individuals who plainly satisfied the test of being among 'my old friends', the trustees could not consistently with the donor's intentions accept them as claiming the whole or any defined part of the fund. They cannot claim the whole fund for they can show no title to it unless they prove they are the only members of the class, which of course they cannot do, and so, too, by parity of reasoning they cannot claim any defined part of the fund and there is no authority in the trustees or the court to make any distribution among a smaller class than that pointed out by the donor.<sup>52</sup>

Although *Re Gulbenkian's Settlements* involved a mere power, the above dictum by itself does not compel a conclusion that the term 'friends' lacks semantic certainty. At the same time, his Lordship's reference to the fund being 'divided equally' between

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<sup>51</sup> It has been suggested that the High Court may have implicitly accepted *McPhail* in *Chief Commissioner of Stamp Duties* (n 6) by treating a disposition there in favour of such charities as the trustees might select, in the absence of a prior appointment in favour of other beneficiaries, as a valid trust power: Harold Ford et al, Thomson Reuters, *The Law of Trusts* (at 3 August 2012) [5.9010].

<sup>52</sup> *Re Gulbenkian's Settlements* (n 20) 524.

‘my old friends’ (or ‘friends’, for that matter) contemplates that each ‘old friend’ receive an equal proportion of the fund. Far from being a power, even of the trust variety, it involves a fixed entitlement in each ‘old friend’, the validity of which is, by definition, premised upon a complete list being made of ‘old friends’.<sup>53</sup> Of course, that the criterion ‘old friend’ appears *prima facie* incapable of certain application challenges the trustee’s (and court’s) ability to make such a list, and thereby functions to infect the disposition with uncertainty of object.

Yet at least in the context of *mere powers*, the foregoing must be viewed against the backdrop of case law upholding dispositions in favour of a donor’s ‘friends’ (or the like). A leading case is *Re Coates (deceased)*, where after making provision for his wife and bequeathing a number of pecuniary legacies, the testator directed, *inter alia*, that

[i]f my wife feels that I have forgotten any friend I direct my executors to pay to such friend or friends as are nominated by my wife a sum not exceeding £25 per friend with a maximum aggregate payment of £250 so that such friends may buy a small memento of our friendship.<sup>54</sup>

Justice Roxburgh was careful to stress that he was ‘not deciding whether or not a power to appoint in favour of a testator’s friends without qualification would be valid’,<sup>55</sup> but instead ‘whether there is such a degree of uncertainty about the word “friends” in the context in which I find it, and in the circumstances of the case, as would justify me in coming to the conclusion that the gift was bad’.<sup>56</sup> Though conceding that ‘friendship’ ‘draws a picture particularly blurred in outline’, his Lordship held that its context, and the circumstances of the case — in particular that the power was vested in the testator’s widow — ‘may well fill in what would otherwise be vague’.<sup>57</sup> What this dictated, Roxburgh J surmised, was that the gift contemplated ‘a degree of intimacy sufficiently close to make its detection quite easy’,<sup>58</sup> so that ‘it is only friends of a considerable degree of intimacy who are to be included in this gift’.<sup>59</sup>

A little over 12 years later a similar issue confronted Plowman J in *Re Gibbard’s Will Trusts*.<sup>60</sup> The testator conferred a mere power in the survivor of two trust beneficiaries, by way of her will, to

<sup>53</sup> See, eg, *Re Connor* (1970) 10 DLR (3rd) 5 (Alberta Supreme Court). This case involved a gift of residue to be ‘divided among my close friends in such a way and at such time as my trustee in her discretion should determine’. The gift was held void for uncertainty because it was not possible to ascertain the entire class of ‘close friends’.

<sup>54</sup> [1955] Ch 495, 495.

<sup>55</sup> *Ibid* 497.

<sup>56</sup> *Ibid* 499.

<sup>57</sup> *Ibid*.

<sup>58</sup> *Ibid*.

<sup>59</sup> *Ibid* 500.

<sup>60</sup> [1967] 1 WLR 42.

appoint my residuary trust funds in such a manner and at such times and under such terms and conditions as she may think fit to charities or charitable institutions and amongst any old employees of mine or their descendants any of my old friends and their descendants and any nephews or nieces of mine and any of their descendants ...<sup>61</sup>

As the law defines the term ‘charity’ (and thus ‘charities’ and ‘charitable’),<sup>62</sup> there was no problem with certainty in that part of the disposition. Nor did the terms ‘employees’, ‘descendants’, ‘nephews’ or ‘nieces’ present difficulties with certainty of object, for the reasons elaborated in *Re Baden’s Deed Trusts* discussed earlier. More challenging on the certainty front, and thus the subject of argument before Plowman J, was the reference to ‘my old friends’. Yet, following *Re Coates (deceased)*, his Lordship viewed that phrase as ‘a sufficiently precise test in the sense that there is no difficulty in envisaging cases where claimants might come along and establish beyond question that they would be eligible to use that expression’.<sup>63</sup> Seemingly influential was the following example offered by counsel for the appointee (that is, object) of the power, Mr Browne-Wilkinson, which Plowman J cited as follows:

suppose that the testator had been at preparatory school with X and had gone on from prep. school to public school with X, and then to University with X; each had become god-father to one of the other’s children, perhaps lived in the same neighbourhood, perhaps belonged to the same club, perhaps played golf together, perhaps dined in each other’s houses and had been doing that for 50 years. Could X, coming along and stating that that was the relationship between the testator and himself, fail to satisfy the description ‘any of my old friends’? I should have thought that the answer was no.<sup>64</sup>

The (mere) power of appointment was accordingly valid. There was no requirement that the objects of the power be capable of exhaustive listing, nor any requirement that the donee be capable *in every instance* of determining with certainty whether or not a person fell within the object class. *Re Gibbard’s Will Trusts* was a weaker case, in the latter regard, than *Re Coates (deceased)*, given that, inter alia, the donee of the power was ostensibly not in as close a relationship to the testator as the donee in *Re Coates (deceased)* (the testator’s wife).

Each of these decisions preceded the House of Lords’ determination in *McPhail*, which in aligning the test of certainty of object concerning mere powers to trust powers obviated the list certainty requirement in the latter context. As noted earlier, the very nature of the ‘certainty’ underscoring the test espoused in *McPhail* rests on a binary inquiry: is an object ‘in’ the class, or ‘out’ of the class? A criterion that introduces matters of degree challenges this approach. What influenced the judges in both *Re Coates (deceased)* and *Re Gibbard’s Will Trusts* were scenarios that

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<sup>61</sup> Ibid 42.

<sup>62</sup> See GE Dal Pont, *Law of Charity* (LexisNexis Butterworths, 2<sup>nd</sup> ed, 2017) ch 2.

<sup>63</sup> *Re Gibbard’s Will Trusts* [1967] 1 WLR 42, 49.

<sup>64</sup> Ibid.

were amenable to inhabiting the 'in' side of the line, the former by reference to the testator's wife and the latter by reference to an obvious factual illustration. Neither case probed more difficult circumstances, namely where the degree of friendship could not be substantiated with the same level of certainty.

It may be that while the House of Lords in *McPhail* opened the door to a wider class of objects than was previously allowable, its approach to the criterion certainty test, which it purported to align with the approach applicable to mere powers, could frustrate the validity of powers such as those in *Re Coates (deceased)* and *Re Gibbard's Will Trusts*. Or it may be that the alternative is the case, namely that cases such as *Re Coates (deceased)* and *Re Gibbard's Will Trusts* remain persuasive in setting the parameters of certainty of object when it comes to discretionary trusts, which if so may well dilute the concept of 'certainty' in that context.

There may be a third alternative: that a further difference remains between mere powers and trust powers when it comes to applying the certainty of object test. It will be recalled that Lord Wilberforce in *McPhail*, in phrasing the criterion certainty test, spoke in terms of its being 'similar' to that accepted in *Re Gulbenkian's Settlements* for mere powers.<sup>65</sup> That his Lordship spoke in terms of similarity as opposed to identity may leave some wiggle room here. It may dictate that trust powers are subject to a more rigorous criterion certainty test than mere powers; that is, the certainty threshold could be higher for trust powers.

Support for this proposition may derive from the fact that their Lordships in *Re Gulbenkian's Settlements* did not mention *Re Gibbard's Will Trusts* (although it was cited in argument). Instead, their Lordships merely cited *Re Coates (deceased)* without elaboration in support, together with other cases, of the criterion certainty test for mere powers. Nor were these two cases cited, even in argument, in *McPhail*. It stands to reason that neither court considered them wrongly decided, a point with especial force in view of Lord Upjohn's 'my old friends' illustration in *Re Gulbenkian's Settlements*, noted earlier. Perhaps this proceeded on the assumption that, as the donee of a mere power has no obligation to make an appointment under the power, the need for a strict approach to certainty is less compelling.

At the same time, there may be a reason in principle capable of unsettling the above proposition. This derives from a common hallmark of a mere power, namely provision for a gift over in default of appointment; that is, provision for the destination of the fund in question should the donee not exercise the power to appoint within a class of objects. The presence of such a gift, it has been judicially observed, 'demonstrates that the donor did not intend to impose a duty on the donee to make a selection in any event but contemplated that he might not elect to do so'.<sup>66</sup> The power in *Re Gulbenkian's Settlements*, for instance, made provision to this effect. The persons who take in default of appointment are commonly termed 'default beneficiaries' (or 'default objects'), which (subject to the terms of the relevant instrument) the law

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<sup>65</sup> *McPhail* (n 12) 456.

<sup>66</sup> *Re Leek (deceased)* [1967] Ch 1061, 1074 (Buckley J).

acknowledges as possessing a *vested* interest typically in the income of the fund, but one liable to be *divested* by the donee exercising the power to distribute that income among the specified class of objects.<sup>67</sup>

As there is a ‘backup’ in the event of the donee not exercising the power, and so no gap in beneficial ownership pertaining to the income (or fund) in question, there may be logic in being *stricter* when it comes to certainty of object in this context than where trustees are compelled to exercise their discretion in favour of a class (trust power). After all, as was envisaged in *Re Gulbenkian’s Settlements*, in so far as the (mere) power there was not exercised by the trustees *or was void for uncertainty*,<sup>68</sup> the income fell to be held upon the trusts declared under the gift over in default provision. The latter provision, in expressing the testator’s intention, serves to overcome the prospect that uncertainty of object, even where some potential objects are identifiable, could frustrate that intention. That, in turn, may be the consequence in the case of a trust power, unsupported by any gift over in default provision. In that context, a stricter approach to certainty has the prospect of fostering the failure of the disposition entirely, and with this frustrating the settlor’s intention.

Whatever may be the correct position, even for mere powers courts acknowledge that certainty plays more than a nominal role. This was apparent, for instance, from the remarks of Lord Reid in *Re Gulbenkian’s Settlements*. His Lordship noted that it was not disputed that if the description of the class is too uncertain, ‘the whole provision fails even although the other potential beneficiaries are easily ascertainable’.<sup>69</sup> Hence, merely because it is possible for the donee to identify persons who can take under the criterion specified does not by itself dictate that the criterion is one capable of certain application.

In view of the foregoing, one may hope to be instructed by investigating the curial approach to (un)certainly of object for mere powers post-*McPhail*. But there is not a great deal of case law to assist when it comes to drawing the certainty line. An indication that *McPhail* has not functioned to upset mere powers aligned with the criterion of friendship is found in *Re Barlow’s Will Trusts*.<sup>70</sup> The judgment was delivered by Browne-Wilkinson J, whom it may be recalled acted as counsel for the appointee (that is, object) of the power in *Re Gibbard’s Will Trusts*. Consistent with

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<sup>67</sup> *Commissioner of Succession Duties (SA) v Isbister* (1941) 64 CLR 375, 380 (Williams J); *Commissioner of Stamp Duties (NSW) v Sprague* (1960) 101 CLR 184, 194 (Dixon CJ).

<sup>68</sup> This was so even though the gift over in default provision made no specific reference to failure due to uncertainty; it simply referred to holding ‘the said income or so much thereof as shall not be paid or applied under such discretionary trust or power’ upon certain trusts: *Re Gulbenkian’s Settlements* (n 20) 520 (Lord Upjohn). Evidently, their Lordships interpreted this clause as encompassing not merely a failure to appoint but a failure of the mere power in its entirety, including for reasons of uncertainty of object.

<sup>69</sup> *Re Gulbenkian’s Settlements* (n 20) 517.

<sup>70</sup> [1979] 1 WLR 278.

his submission in that case, his Lordship was willing to uphold the validity of a bequest of valuable artwork on a trust for sale, subject to the executor

allow[ing] any member of my family and any friends of mine who may wish to do so to purchase any of such pictures at the prices shown in [a] catalogue or at the values placed upon them by valuation for probate purposes at the date of my death, whichever shall be the lower.<sup>71</sup>

The argument was presented that the term ‘friends’ was semantically uncertain because of the many different degrees of friendship, it being impossible to say which degree the testatrix had in mind.<sup>72</sup> Justice Browne-Wilkinson accepted that if the nature of the gift made it legally necessary to draw a complete list of the testatrix’s ‘friends’, or to be able to say of any person that ‘he is not a friend’, the entire gift ‘would probably fail even as to those who, by any conceivable test, were friends’.<sup>73</sup> But this was not so on the facts, according to his Lordship, who explained the point as follows:

But in the case of a gift of a kind which does not require one to establish all the members of the class (eg ‘a gift of £10 to each of my friends’), it may be possible to say of some people that on any test, they qualify. Thus ... the example of a gift to X ‘if he is a tall man’; a man 6 ft 6 ins tall could be said on any reasonable basis to satisfy the test, although it might be impossible to say whether a man, say, 5 ft 10 ins high satisfied the requirement.

So in this case, in my judgment, there are acquaintances of a kind so close that, on any reasonable basis, anyone would treat them as being ‘friends’. Therefore, by allowing the disposition to take effect in their favour, one would certainly be giving effect to part of the testatrix’s intention even though as to others it is impossible to say whether or not they satisfy the test.<sup>74</sup>

*Re Barlow’s Will Trusts* adds another wrinkle to the certainty of object scenario. It must be conceded that it does not engage the standard ‘mere power’ scenario, instead being better described in terms of a testamentary option. Accordingly, any exercise of ‘discretion’ in this context lies in the optionee, not in the donee (or trustee) of any power.<sup>75</sup> At the same time, though, standing to exercise the option rested upon

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<sup>71</sup> Ibid 280.

<sup>72</sup> Ibid. His Lordship also addressed the criterion of ‘family’, noting that ‘[i]t is not suggested that this class is too uncertain’, and that ‘[i]n the absence of issue, the prima facie meaning of “family” means “relations,” that is to say those related by blood’: at 283.

<sup>73</sup> Ibid 281.

<sup>74</sup> Ibid.

<sup>75</sup> It may be observed, as an aside, that the position of an optionee vis-à-vis the relevant property is ‘stronger’ than that of a beneficiary of a discretionary trust vis-à-vis the trust property. After all, the optionee can select property within the terms of the option, whereas the beneficiary of a discretionary trust cannot call for distribution. It

being a member of a class specified by the criterion ‘friends’, and so in order to fulfil its obligations the trustee could only accede to applications by persons within that criterion.

As appears from the foregoing, Browne-Wilkinson J approached this inquiry from the perspective of eligibility rather than ineligibility. After all, he targeted ‘acquaintances of a kind so close that, on any reasonable basis, anyone would treat them as being “friends”’. And, as noted above, he had earlier branded as uncertain a requirement that involved the trustee being able to say of any person that ‘he is not a friend’. This in turn bespeaks a rather diluted concept of certainty, which may be satisfied provided that some persons can clearly substantiate their status as a ‘friend’, notwithstanding that there are others whose status as a friend may be less compelling, and others again who on no reasonable basis could be described as friends. Driven to give (maximum) effect to testamentary intention, the decision seems quite divorced from the criterion certainty approach espoused in *McPhail*.

The only Australian case to address the ‘friends’ aspect of *Re Barlow’s Will Trusts* is *Lempens v Reid*,<sup>76</sup> a 2009 decision of the Supreme Court of South Australia. However, Gray J in that case did not need to squarely address the certainty threshold in a case such as *Re Barlow’s Will Trusts* (or indeed *Re Coates (deceased)* or *Re Gibbard’s Will Trusts*), as the disposition in question was not phrased in discretionary terms. The relevant testamentary clause purported to bequeath one-half of the estate to ‘such of them my friends who resided with me from overseas’. His Honour found this clause semantically uncertain, although at the same time cast no aspersions on the correctness of *Re Barlow’s Will Trusts* (or of *Re Coates (deceased)* and *Re Gibbard’s Will Trusts*), thus leaving the issue of certainty somewhat suspended.

In view of the preceding discussion, there are reasons to believe that the concept of ‘certainty’ when it comes to exercises of trustee discretion may be less precise than appears at first glance. Not every scenario, it seems, is amenable to judges applying the binary ‘in’ and ‘out’ approach espoused in *McPhail*. And it goes to show that certainty is not always premised upon the ability to clearly distinguish between two disparate classifications. As illustrated below, moreover, the challenges in this regard are (perhaps unsurprisingly) not confined to fixed and discretionary (‘individual’) trusts but are capable of emerging when making the distinction, again in the realm of certainty of object, between individual and purpose trusts.

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may be argued, then, that the more ‘concrete’ nature of the optionee’s interest should spawn a stricter test of certainty than that which applies in the discretionary trust environment.

<sup>76</sup> *Lempens* (n 20).

## V PRIVATE PURPOSE TRUSTS

A *The Certainty Rule*

When speaking of purpose trusts, the charitable trust looms large because it is arguably the only purpose trust that can, in Australian law, categorically and without exception be characterised as valid. As has long been understood, equity treated charity with tenderness, broadly speaking because it encouraged financial support for objects accruing for the public benefit. As a charitable trust is by its very nature a purpose trust (despite the fact that individuals ultimately benefit therefrom, given that the benefit must accrue to the *human* public),<sup>77</sup> the beneficiary principle requires modification in the charitable environment. The law has done so by essentially treating the ‘purpose’ as the beneficiary, in circumstances where it falls within the legal (as opposed to dictionary) definition of ‘charity’.

However, a ‘purpose’, unlike an individual beneficiary, cannot enforce a trustee’s obligation; it does not have an ‘interest’ in the proper management of the trust property, and so is not positioned to raise any issue before a court. This could manifest itself in little or no control over the trustee’s use (and abuse) of the trust property unless the law were to provide some avenue to this end. In the context of charitable trusts, the law has done so via its longstanding conferral upon the relevant Attorney-General, representing the public (which is to benefit), of standing to enforce such trusts. It may be observed that, as Attorneys-General do not maintain a list of charitable trusts, do not conduct trustee compliance audits, and do not receive trust financial (and other) statements,<sup>78</sup> the notion of enforcement here rests upon an individual with an ‘interest’ alerting the Attorney-General to potential trustee infelicities.

Otherwise, certainty of object when dealing with charitable trusts shares a core similarity with that pertaining to individual trusts. In each case the trust either fulfils certainty of object — for individual trusts, as noted earlier, by reference to the certainty surrounding beneficiaries or beneficiary classes; for purpose trusts, by certainty manifested by coming under the ‘charitable’ umbrella as defined by the law — or it fails. There are, again, only two outcomes, with no intermediate ‘partial certainty’ category; the exercise is ‘all or nothing’. That a legal meaning attaches to the concept of ‘charity’ does not, however, mean that its parameters are always

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<sup>77</sup> Which explains why objects directed to, say, benefiting animals per se are not charitable whereas those directed at the protection and preservation of animals, from which some benefit to humans can ensue, are charitable: see the discussion in *Murdoch v A-G (Tas)* (1992) 1 Tas R 117.

<sup>78</sup> The situation has changed with the operation of the Australian Charities and Not-For-Profits Commission, which registers charities, performs a monitoring role, and receives statements from registered charities: see *Australian Charities and Not-For-Profits Commission Act 2012* (Cth) chs 2 (registration), 3 (record-keeping and reporting), 4 (information gathering, monitoring and enforcement powers). This initiative does not, however, supplant the enforcement of charitable trusts by the relevant Attorney-General.

precise.<sup>79</sup> Questions of degree sometimes emerge, which challenge the parameters of ‘certainty’.

The foregoing explains not only frequent litigation in this regard, but outcomes (especially in the context of allegedly charitable associations) that are difficult to view as precedential, given minute distinctions between influential facts.<sup>80</sup> And it has engaged the courts in semantic (and, from a testator’s perspective, questionable) distinctions between ‘charity’ and prima facie similar terms such as ‘benevolent’ or ‘philanthropic’.<sup>81</sup> Unlike in the individual trust scenario, however, the charity environment in each Australian state has witnessed statute expand certainty of object to encompass what may prove no more than ‘partially charitable’ and thus only ‘partially certain’. Colloquially known as ‘saving legislation’,<sup>82</sup> it functions to bring within the charity fold objects that fall outside the legal concept of ‘charity’ if the court is satisfied of a ‘distinct or sufficient indication’ of an intention to benefit charity, albeit not exclusively.<sup>83</sup>

As this article targets private trusts, mention of charitable (public) trusts is made primarily for context. But it serves to highlight why purpose trusts that are not ‘charitable’ at law (and cannot be ‘saved’ by statute) confront traditionally insurmountable hurdles to certainty of object. Trusts of this kind, as foreshadowed above, contravene the beneficiary principle precisely because they lack a beneficiary with standing to enforce the trustees’ obligations thereunder. Accordingly, aside from a longstanding but anomalous exception surrounding the maintenance of a testator’s tomb or animals,<sup>84</sup> non-charitable purpose trusts are treated as prima facie void, even if there are individuals who have an interest in their enforcement.

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<sup>79</sup> While the law usually attributes legal meanings to terms to give them greater precision than dictionary meanings, the converse is ostensibly the case when it comes to the legal meaning of ‘charity’, which in most respects is broader and more amorphous than its dictionary equivalent: see GE Dal Pont, ‘Charity Law: “No Magic in Words”?’ in Matthew Harding, Ann O’Connell and Miranda Stewart (eds), *Not-For-Profit Law: Theoretical and Comparative Perspectives* (Cambridge University Press, 2014) 87.

<sup>80</sup> Compare, for example, *Chamber of Commerce and Industry of Western Australia (Inc) v Commissioner of State Revenue (WA)* (2012) 89 ATR 797 with *South Australian Employers’ Chamber of Commerce & Industry Inc v Commissioner of State Taxation (SA)* (2017) 106 ATR 305.

<sup>81</sup> See, eg, *Chichester Diocesan Fund and Board of Finance (Incorporated) v Simpson* [1944] AC 341 where a trust for ‘charitable or benevolent’ purposes was held void as an admixture of charitable and non-charitable objects.

<sup>82</sup> See *Charitable Trusts Act 1993* (NSW) s 23; *Trusts Act 1973* (Qld) s 104; *Trustee Act 1936* (SA) s 69A; *Variation of Trusts Act 1994* (Tas) ss 4(2)–(3); *Charities Act 1978* (Vic) s 7M; *Trustees Act 1962* (WA) s 102.

<sup>83</sup> *McCracken* (n 50) 81 (Phillips J).

<sup>84</sup> Its ‘troublesome, anomalous and aberrant’ nature (*Re Endacott (deceased)* [1960] Ch 232, 251 (Harman LJ)) explains why further discussion of this exception is omitted from this article. On this topic see James Brown, ‘What Are We to Do With Testamentary Trusts of Imperfect Obligation?’ (2007) 71 (March/April) *Conveyancer and Property Lawyer* 148.

This has in turn prompted arguments that what appear to be purpose trusts are instead trusts for individuals, and the case law evinces occasions where courts have acceded to such arguments,<sup>85</sup> as well as rejected them.<sup>86</sup> It has equally driven submissions that the legal concept of ‘charity’ ought to be extended to encompass the purpose(s) in question, which again have sometimes succeeded,<sup>87</sup> but other times failed.<sup>88</sup>

### B *The Rule Relaxed?*

There is nonetheless a line of authority treading what can, at least in one sense, be viewed as a middle ground. It emanated from the decision of Goff J in *Re Denley’s Trust Deed*, involving a trust of land to

be maintained and used as and for the purpose of a recreation or sports ground primarily for the benefit of the employees of [a specified] company and secondarily for the benefit of such other person or persons (if any) as the trustees may allow to use the same ...<sup>89</sup>

The employees were, under the terms of the trust, entitled (subject to rules and regulations made by the trustees) to use and enjoy the land. Having characterised this as a purpose trust — in line with the language of the said clause — but not a charitable trust (by reason of its sporting and recreational nature),<sup>90</sup> trusts orthodoxy should have led Goff J to declare the trust void. Yet its validity was upheld, following a distinction his Lordship espoused. The void side of the (fault) line was conceptualised in the following terms:

I think there may be a purpose or object trust, the carrying out of which would benefit an individual or individuals, where that benefit is so indirect or intangible or which is otherwise so framed as not to give those persons any *locus standi* to apply to the court to enforce the trust, in which case the beneficiary principle would, as it seems to me, apply to invalidate the trust ... [T]he beneficiary principle ... is confined to purpose or object trusts which are abstract or impersonal. The objection is not that the trust is for a purpose or object per se, but that there is no beneficiary or cestui que trust ...<sup>91</sup>

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<sup>85</sup> See, eg, *Re Segelman (deceased)* [1996] Ch 171.

<sup>86</sup> See, eg, *Strathalbyn Show Jumping Club Inc v Mayes* (2001) 79 SASR 54 (*‘Strathalbyn Show Jumping Club’*).

<sup>87</sup> See, eg, *Tasmanian Electronic Commerce Centre Pty Ltd v Federal Commissioner of Taxation* (2005) 142 FCR 371.

<sup>88</sup> See, eg, *Re Shaw (deceased)* [1957] 1 WLR 729.

<sup>89</sup> [1969] 1 Ch 373, 375.

<sup>90</sup> On sporting and recreational trusts falling outside the charity net see Dal Pont, *Law of Charity* (n 62) 268–76 [12.2]–[12.12].

<sup>91</sup> *Re Denley’s Trust Deed* [1969] 1 Ch 373, 382–3.

This was distinct from occasions where ‘the trust, though expressed as a purpose, is directly or indirectly for the benefit of an individual or individuals’, which Goff J located as ‘in general outside the mischief of the beneficiary principle’.<sup>92</sup> His Lordship, being concerned with scope for the enforcement of the trust, clearly perceived company employees to have a sufficient ‘interest’ in enforcing the trust (being ‘capable of ascertainment at any given time’ in line with the then governing test in *Broadway Cottages*), and thus to bring to the court’s attention any trustee behaviour inconsistent with its terms.<sup>93</sup> In his Lordship’s opinion, the court could then

execute the trust both negatively by restraining any improper disposition or use of the land, and positively by ordering the trustees to allow the employees and such other persons (if any) as they may admit to use the land for the purpose of a recreation or sports ground.<sup>94</sup>

There is no Australian authority to date endorsing this approach (although it has been followed in England).<sup>95</sup> Instead, dicta in two first instance decisions cast doubt over its legitimacy. Yet the first obviated any need to probe the point because the judge found the case did not involve a purpose trust,<sup>96</sup> whereas the second did not, on the test proposed by Goff J in *Re Denley’s Trust Deed*, involve the alleged beneficiaries being ascertainable at a given time.<sup>97</sup>

The decision has also been subject to academic criticism for supposedly introducing a new category of non-charitable purpose trust.<sup>98</sup> While the trust in *Re Denley’s Trust Deed* was expressed for a purpose, and was so acknowledged by Goff J, whether it indeed heralded an intermediate category between valid individual trusts and invalid purpose trusts is not quite as clear. That his Lordship located the question of the trust’s enforcement, and with this the incidents of certainty of object, squarely in the hands of the company employees appears to treat the employees as individual beneficiaries thereof. His expression of the trust as ‘directly or indirectly for the benefit of an individual or individuals’<sup>99</sup> speaks to this, as does his application, mentioned above, of the *Broadway Cottages* test of certainty of object. In passing, it should be

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<sup>92</sup> Ibid 383–4.

<sup>93</sup> Ibid 386.

<sup>94</sup> Ibid 388.

<sup>95</sup> See *Re Lipinski’s Will Trusts* [1976] Ch 235, 247–8 (Oliver J).

<sup>96</sup> *Tidex v Trustees Executors & Agency Co Ltd* [1971] 2 NSWLR 453, 465 (Street J). Cf *Radmanovich v Nedeljkovic* (2001) 52 NSWLR 641, 664–5 [127]–[129] (Young CJ in Eq) (who made brief passing mention of *Re Denley’s Trust Deed*, but similarly considered it factually inapplicable on the facts in question).

<sup>97</sup> *Strathalbyn Show Jumping Club* (n 86) 65 [50]–[51] (Bleby J).

<sup>98</sup> See, eg, JM Evans, ‘Purpose Trusts — Further Refinements’ (1969) 32(1) *Modern Law Review* 96.

<sup>99</sup> *Re Denley’s Trust Deed* [1969] 1 Ch 373, 383.

noted that in some jurisdictions the issue has been addressed by way of statute to validate certain purpose trusts<sup>100</sup> or to vest standing in an ‘enforcer’ or ‘protector’.<sup>101</sup>

## VI WHERE DOES THIS TAKE (OR LEAVE) US?

This article commenced with the observation that the law is continually engaged in drawing (fault) lines designed to dictate one outcome or another in a given factual scenario. Inquiries into certainty of object for private trusts simply present one illustration of this exercise. That certainty of object goes to the *validity* of private (as well as charitable) trusts may function to bolster the proposition that the line between certainty and uncertainty in this context should be marked by an objectively determinable inquiry.

So it proves, at least *prima facie*. For fixed trusts, certainty of object is governed by the list certainty test, which simply asks whether it is possible to make a complete list of the beneficiaries at the distribution date. For discretionary trusts, the same inquiry rests upon proof of ‘criterion certainty’, namely whether from a ‘definitional’ (or ‘semantic’) perspective a person falls within or outside the beneficiary class so defined. And courts have long proven able to distinguish individual from purpose trusts, and sided with one or the other, depending on the language of the relevant disposition, notwithstanding occasions where indicators potentially led both ways.

Yet as catalogued in this article, there are instances where the certainty inquiry has not proven entirely amenable to such an objective determination. Justice Young in *West* envisaged that certainty for fixed trusts need not always require the capacity to draw a complete list of beneficiaries, but that ascertaining a ‘substantial majority of the beneficiaries’ where ‘no reasonable inquiries could be made which would improve the situation’ could suffice.<sup>102</sup> Case law involving discretions as to appointment, moreover, has revealed that a criterion upon which reasonable minds may differ — ‘friendship’ — may not necessarily infringe the criterion certainty test. And in *Re Denley’s Trust Deed* what appeared to be a (non-charitable) purpose trust was upheld because, rather than being ‘abstract and impersonal’, it enured ‘directly or indirectly for the benefit of an individual or individuals’.<sup>103</sup>

Each of these instances challenges the ‘certainty’ of object inquiry in a similar way, by inviting inquiry into a matter of degree. What is a ‘substantial majority’? What are the parameters of ‘friendship’? Where is the line drawn between the ‘impersonal’ and the ‘individual’? This is not to say that matters of degree are inconsistent with certainty in outcomes — after all, many determinations in the legal sphere require

<sup>100</sup> See, eg, *Perpetuities Act*, RSO 1990, c P.9, s 16(1) which is Canadian legislation that treats trusts for non-charitable purposes as valid powers.

<sup>101</sup> See, for instance, the discussion in Tsun Hang Tey, ‘The Duties of a Trust Enforcer’ (2010) 22(2) *Singapore Academy of Law Journal* 363.

<sup>102</sup> *West* (n 15) 664.

<sup>103</sup> [1969] 1 Ch 373, 383.

drawing a line based on degree — but that the precision traditionally understood as underscoring certainty of object in private trusts may be more fluid than first envisioned. It reveals that while tests directed to making a clear division between two potential outcomes are valuable — and especially so where those outcomes are polar opposites, with distinct proprietary consequences — circumstances may arise that are capable of justifying a mitigation of their strictness and apparent objectivity.

If so, the ‘certainty’ underscoring certainty of object for private trusts may not necessarily be certainty as we have always imagined it, and the question centres on whether the law should be any the worse for it. In addressing that question, it is notable that on each occasion where judges have been inclined to broaden (or loosen) the certainty envelope, they have been minded to preserve the rationale for the certainty requirement. As foreshadowed at the outset of the article, certainty of object is designed to curb the spectre of uncontrolled (legal) power in the trustee and thereby ensure that the beneficiaries enforce their (equitable) entitlements under the trust. The focus in each case upon beneficiaries (or objects) with standing to enforce the relevant obligations speaks to this.

Assuming that the mischief to which certainty of object is directed can be adequately addressed in these instances, a powerful policy reason supports the validity of these dispositions, namely giving effect to the donor’s intention. This was implicit in *Re Coates (deceased)*, *Re Gibbard’s Will Trusts* and *Re Denley’s Trust Deed*, and explicitly acknowledged in *West* and *Re Barlow’s Will Trusts*. In a society and legal system premised upon private ownership of property, with the attendant freedom to dispose of property as its owner deems fit, it would be odd for the law to frustrate the formal expression of that freedom without a compelling justification. It may be queried, to this end, whether an inability to precisely ascertain or distinguish every beneficiary should necessarily constitute such a justification.

It should not be overlooked, moreover, that in the testamentary context, where much of the case law on certainty of object has emanated, courts have long acknowledged the force of a rule of construction informed by the Latin phrase *ut res magis valeat quam pereat*, translated as ‘that the thing may rather have effect than be destroyed’.<sup>104</sup> In construing testamentary dispositions, the law has also long recognised and applied a presumption against intestacy, prompting the adoption, where possible, of a construction that avoids property devolving under the intestacy rules rather than according to the testator’s intention.<sup>105</sup> It may be recalled that *West* and the ‘friendship’ cases each involved testamentary dispositions; and although *Re Denley’s Trust Deed* did not, the outcome would presumably have been bolstered had it inhabited the testamentary environment.

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<sup>104</sup> This has witnessed repeated acknowledgement and application by the High Court: see, eg, *Carroll v Perpetual Trustee Co Ltd* (1916) 22 CLR 423; *Fell v Fell* (1922) 31 CLR 268; *Roman Catholic Archbishop of Melbourne v Lawlor* (1934) 51 CLR 1.

<sup>105</sup> See Dal Pont, *Interpretation of Testamentary Documents* (n 47) 57–60 [3.3]–[3.5].

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In view of the foregoing, some loosening of the test of certainty of object for private trusts, where it does not threaten the mischief underscoring the beneficiary principle and gives effect to dispositive intention, may not unduly prejudice the binary exercise involved in drawing the 'fault lines' inherent in the concept of 'certainty'. In the words of Oliver Wendell Holmes Jr, the law may prove 'none the worse for it'.

Catherine Bond\*

**CROWN OWNERSHIP OF COPYRIGHT:  
THE OFFICIAL HISTORY OF AUSTRALIA IN THE  
WAR OF 1914–1918 AS A CASE STUDY**

ABSTRACT

Since 1912 Australian copyright statutes have included specific provisions relating to Crown and government ownership of copyright material, though such ownership can also be acquired through either the prerogative right or the general ownership provisions of the relevant statute. However, quite diverse terms of copyright apply according to the different statutory provisions — 50 years for works protected under the specific Crown copyright sections as opposed to life of the author plus 70 years under the general provisions. This article examines the significant ramifications of the gaps between the general and Crown ownership provisions of past and present copyright legislation, employing a case study that exposes the difficulties this can cause. Through an examination of Commonwealth ownership of copyright in *The Official History of Australia in the War of 1914–1918*, published as 12 volumes between 1921 and 1942, this article reveals the significant uncertainty around the application of this dichotomy of ownership continuing to this day. It posits that, despite claims by the Australian War Memorial that copyright continues to subsist in the series, even on a broad interpretation of the law at least three of the volumes are today in the public domain.

I INTRODUCTION

In its 2005 *Crown Copyright* report,<sup>1</sup> the Copyright Law Review Committee ('CLRC') made the following comments on government ownership of copyright material under the *Copyright Act 1968* (Cth):

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\* Senior Lecturer, Faculty of Law, UNSW Sydney; Visiting Research Fellow, Faculty of Business and Law, Swinburne University of Technology. With thanks to Kathy Bowrey and Michael Handler for their assistance on aspects of this work; Marie Hadley and Georgina Riley for editorial assistance; Nigel Bond for his comments on drafts; and Swinburne Law School, where the bulk of this article was completed. This work was in part supported by the Australian Research Council Grant DP14010017.

<sup>1</sup> Despite having been released 14 years ago at the time of publication of this article, the Commonwealth Government is yet to formally respond to any of the recommendations made by the Copyright Law Review Committee ('CLRC') in this report. However, subsequent legislative amendments indicate a rejection of one aspect of one

3.07 There are three possible sources of government ownership of copyright under the *Copyright Act*:

- the general ownership provisions, particularly those which vest copyright in employees' work in their employer;
- the Crown prerogative in the nature of copyright; and
- the special Crown ownership provisions in Part VII of the Act.

3.08 These categories are not necessarily mutually exclusive: there is authority to suggest that a government may own copyright in a work under either the general provisions of the Act or under the Part VII provisions.<sup>2</sup>

As support for that final statement the CLRC cited the decision of the Supreme Court of New South Wales in *Director-General of Education v Public Service Association of New South Wales*,<sup>3</sup> involving infringement of government-owned copyright in a report produced in the NSW Department of Education. Justice McLelland, considering the issues of subsistence and ownership of the copyright in question pursuant to the *Copyright Act 1968* (Cth), simply noted:

Prima facie, the Report is an unpublished original literary work (in the sense in which that expression is used in the *Copyright Act 1968* (Cth)) in which copyright subsists by virtue of s 32(1) of that Act, and the State of New South Wales (or more formally the Crown in right of the State) is the owner of such copyright pursuant either to s 35(6) or to s 176 of that Act.<sup>4</sup>

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of the recommendations: from 1 January 2019, s 180 of the *Copyright Act 1968* (Cth) caps the duration at '50 years after the calendar year in which the material is made': see *Copyright Amendment (Disability Access and Other Measures) Act 2017* (Cth) sch 2 item 12. Removing perpetual copyright for unpublished works of this nature is a rejection of one element of Recommendation 2. See CLRC, *Crown Copyright* (Report, 2005) xxiii, Recommendation 2 <<http://www.austlii.edu.au/au/other/clrc/18.pdf>>.

<sup>2</sup> CLRC (n 1) [3.07]–[3.08] (citation omitted). The first and third sources are the focus of this article. For further information on the prerogative right of the Crown in the nature of copyright see CLRC (n 1) ch 6; Ann Monotti, 'Nature and Basis of Crown Copyright in Official Publications' (1992) 14(9) *European Intellectual Property Review* 305. Indeed, a very different duration issue arises in relation to the prerogative right of the Crown in the nature of copyright, given it is perpetual in nature: see CLRC (n 1) [6.01].

<sup>3</sup> (1985) 79 FLR 15.

<sup>4</sup> *Ibid* 18–19. See also *Commonwealth v John Fairfax & Sons Ltd* (1980) 147 CLR 39, 54; *Commonwealth v Oceantalk Australia Pty Ltd* (1998) 79 FCR 520, 524 ('Oceantalk').

In a similar vein, in *Insight SRC IP Holdings Pty Ltd v Australian Council for Educational Research Ltd*,<sup>5</sup> a 2012 decision involving copyright ownership and infringement in a questionnaire, Besanko J commented:

It is clear, I think, that both ss 176(2) and 35(6) may apply to the one factual situation. In some circumstances, s 176(2) may have a wider operation than s 35(6). For example, s 176(2) may apply to a contractor. On the other hand, a work may be made in pursuance of the terms of a contract with the Crown within s 35(6), but not be made under the direction or control of the Crown within s 176(2).<sup>6</sup>

Since 1912 Australian copyright statutes have included specific provisions in relation to Crown and government ownership of copyright material, of the type discussed by the CLRC and in these two judgments. Pursuant to s 18 of the *Copyright Act 1911* (Imp), in force in Australia by virtue of s 8 of the *Copyright Act 1912* (Cth), the Commonwealth or a state or territory government would own copyright in ‘any work ... prepared or published by or under the direction or control of His Majesty or any Government department’.<sup>7</sup> However, Crown ownership of copyright did not rely solely on that provision, a position that continues to this day.<sup>8</sup>

Under the general provisions of the *Copyright Act 1968* (Cth), copyright may subsist in a work pursuant to s 32(1) or (2).<sup>9</sup> While the author is generally the first owner of the copyright,<sup>10</sup> an author may prospectively or retrospectively assign copyright to the government,<sup>11</sup> or if the work is produced by an employee, as employer the government would be the owner by virtue of s 35(6).<sup>12</sup> At the same time, if a work is ‘made by, or under the direction or control of, the Commonwealth or a State’ and copyright would not otherwise subsist in that work, it will be protected under s 176(1).<sup>13</sup> A government will also own copyright in works ‘made by, or under ...

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<sup>5</sup> (2012) 292 ALR 741 (*‘Insight’*).

<sup>6</sup> *Ibid* 750. Justice Besanko ultimately found that neither ss 35(6) nor 176(2) applied in the circumstances: see *ibid* 759–61. On appeal, the Full Court of the Federal Court overturned certain findings made by Besanko J in relation to damages but affirmed his Honour’s interpretation of the ownership issues. See *Insight SRC IP Holdings Pty Ltd v Australian Council for Educational Research Ltd* (2013) 101 IPR 484, 493–4.

<sup>7</sup> *Copyright Act 1912* (Cth) sch 1, *Copyright Act 1911* (Imp) 2 Geo 5 c 46, s 18 (*‘Copyright Act 1911* (Imp)’). Section 18 was silent on the subsistence of copyright, in contrast to one of the equivalent provisions today: see *Copyright Act 1968* (Cth) s 176(1).

<sup>8</sup> See, eg, *A-G (NSW) v Butterworth & Co (Australia) Ltd* (1938) 38 SR (NSW) 195, which confirmed the existence of the prerogative right of a government to print and publish legislation.

<sup>9</sup> *Copyright Act 1968* (Cth) ss 32(1)–(2).

<sup>10</sup> *Ibid* s 35(2).

<sup>11</sup> *Ibid* ss 196(1), 197(1).

<sup>12</sup> *Ibid* s 35(6).

<sup>13</sup> On the application of this provision: see *Oceantalk* (n 4).

[its] direction or control’ pursuant to s 176(2).<sup>14</sup> If first publication of the work is undertaken ‘by, or under the direction or control of, the Commonwealth or the State’, then copyright will also be owned by the relevant government pursuant to the ownership provision in s 177.<sup>15</sup> There may be multiple ownership avenues for the same copyright.

Given the myriad ways through which the Commonwealth or a state or territory government can own and assert ownership of copyright, this has generally been a non-controversial issue. Greater discussion has arisen around whether copyright *should* subsist in a variety of government-produced materials,<sup>16</sup> and avenues for increasing access to and reuse of such material.<sup>17</sup> However, this lack of controversy and focus on other areas has resulted in a failure to examine a number of important gaps that exist between the general and Crown copyright provisions. The most significant of these relates to the duration of protection.

Consider the following example. Dr A, an Australian citizen and independent consultant with a background in the university sector, is approached by State Government B to write a report on Issue C. After negotiations, Dr A and State Government B enter into a written contract, which details the area of the report (Issue C); the length of the report (400 pages); the time Dr A has to write the report (three years); the annual salary to be paid to Dr A; and stipulates that ‘State Government B will own copyright in the report’. Beyond these matters, the content, creation and completion of the report are entirely at the discretion of Dr A, although a number of politicians and high-level public servants provide feedback on the report during its writing. After three years the report has been completed and State Government B organises for Publisher D, a privately-run company, to publish the report. It is released on the website for State Government B, on the personal website of Dr A and in hard copy on the same day at 10am.

The *Copyright Act 1968* (Cth) would apply to this work as follows. On the one hand, copyright would subsist in the report under the general provisions, as an unpublished work, as it is being drafted.<sup>18</sup> A valid assignment of that copyright to the government has also occurred.<sup>19</sup> However, on the other hand, the elements of the general Crown

<sup>14</sup> *Copyright Act 1968* (Cth) s 176(2).

<sup>15</sup> *Ibid* s 177.

<sup>16</sup> See generally Judith Bannister, ‘Open Access to Legal Sources in Australasia: Current Debate on Crown Copyright and the Case of the Anthropomorphic Postbox’ [1996] 3 *Journal of Information, Law and Technology* <[https://warwick.ac.uk/fac/soc/law/elj/jilt/1996\\_3/bannister/](https://warwick.ac.uk/fac/soc/law/elj/jilt/1996_3/bannister/)>; CLRC (n 1) [4.16]–[4.89]; Catherine Bond, ‘Reconciling Crown Copyright and Reuse of Government Information: An Analysis of the CLRC Crown Copyright Review’ (2007) 12(3) *Media and Arts Law Review* 343, 346–50.

<sup>17</sup> See generally Judith Bannister, ‘Open Government: From Crown Copyright to the Creative Commons and Culture Change’ (2011) 34(3) *University of New South Wales Law Journal* 1080.

<sup>18</sup> *Copyright Act 1968* (Cth) s 32(1), then upon publication s 32(2).

<sup>19</sup> *Ibid* ss 196–7.

copyright provision, s 176, would also apply, regardless of the existence of the agreement.<sup>20</sup> In *Copyright Agency Ltd v New South Wales*,<sup>21</sup> Emmett J, in addition to defining each of these terms, considered that the phrase ‘made by, or under the direction or control of, the Commonwealth or a State’ may come down to the following analysis:

The question is whether the Crown is in a position to determine whether or not a work will be made, rather than simply determining that, *if it is to be made at all*, it will be made in a particular way or in accordance with particular specifications.<sup>22</sup>

Given that the report has also been first published by State Government B, then the section providing for Crown ownership of works first published by government, section 177, would also apply.<sup>23</sup> Again, this would operate regardless of the contract between Dr A and State Government B. Thus, there are three possible avenues for ownership: the general provisions of the Act, ss 176(2) and 177.<sup>24</sup>

Further examination of the applicable section is required, however, in order to determine the relevant duration of copyright.<sup>25</sup> If copyright in a work is owned by the government under either sections 176(2) or 177, then, today, following amendments to section 180 made by the *Copyright Amendment (Disability Access and Other Measures) Act 2017* (Cth), the applicable period of copyright is ‘50 years after the calendar year in which the material is made’.<sup>26</sup> If it is owned by virtue of the

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<sup>20</sup> Ibid s 176(1)–(2).

<sup>21</sup> (2007) 159 FCR 213.

<sup>22</sup> Ibid 238 (emphasis in original).

<sup>23</sup> *Copyright Act 1968* (Cth) s 177.

<sup>24</sup> It is worth noting that s 182(1) of the *Copyright Act 1968* (Cth) reads as follows:

Part III (other than the provisions of that Part relating to the subsistence, duration or ownership of copyright) applies in relation to copyright subsisting by virtue of this Part in a literary, dramatic, musical or artistic work in like manner as it applies in relation to copyright subsisting in such a work by virtue of that Part.

However, as the CLRC noted, there is still confusion as to the relationship between Parts III, IV and VII of the *Copyright Act 1968*: see CLRC (n 1) xxii.

<sup>25</sup> As the CLRC noted, ‘[t]he duration of government ownership of copyright varies according to which of the statutory provisions or the prerogative right in the nature of copyright applies’: see CLRC (n 1) [3.15].

<sup>26</sup> Prior to 1 January 2019, pursuant to s 180(1)(b) copyright would expire at 50 years from first publication; under the *Copyright Act 1968* (Cth), as enacted, s 180(1)(b) provided copyright ‘continue[d] to subsist, until the expiration of fifty years after the expiration of the calendar year in which the work was first published’. Under the *Copyright Act 1911* (Imp) (n 7) s 18 the relevant period of protection was also 50 years from first publication. Section 180 was amended pursuant to the *Copyright Amendment (Disability Access and Other Measures) Act 2017* (Cth), changing the triggering date of the duration of copyright; see discussion in (n 1) above. With regard to the expiration of copyright at the ‘calendar year’ mark, a similar proviso was also included in the general duration provisions as enacted and continues today: see

assignment, the period stipulated in s 33(2) item 1 would apply: life of the author plus 70 years after the calendar year in which Dr A dies.<sup>27</sup> These are two very different terms of copyright that, to quote Besanko J, ‘apply to the one factual situation’. There is no legislative or judicial guidance as to how these differences should be resolved; such consideration would only occur if the matter of duration was in issue, and thus has not occurred to date.<sup>28</sup> More generally, although the position remains unclear, it is assumed that the Crown copyright provisions would trump the application of the general provisions; their very existence suggests that this would be the case.<sup>29</sup> Yet, in the circumstances identified here, State Government B has a perverse incentive to seek to deny the application of sections 176(2) or 177 — if the specific Crown copyright provisions do not apply, then it can take advantage of the longer period of protection provided by virtue of Dr A’s assignment.

This example highlights the very real issues that can occur in relation to duration of copyright and government ownership of that copyright. Once additional authors, additional works and shifting dates of publication are factored in, such analysis becomes even more perplexing. Yet, this is what has occurred in the case of one of the most significant works of Australian military, political and social history: *The Official History of Australia in the War of 1914–1918* (‘the *Official History*’).<sup>30</sup> It is this example that will be adopted as a case study to further illustrate the complexities existing in this area and the unresolved issues remaining in relation to copyright in this work to this day.

In 1919, following his time as the Official War Correspondent for Australia, Charles Edwin Woodrow Bean was appointed Official Historian and tasked with producing and editing a 12 volume account of the Australian involvement in WWI.<sup>31</sup> Bean was to write six of the 12 volumes; produce a pictorial volume; and edit the remaining five volumes, which would be penned by different authors. Although Bean predicted the full *Official History* could be written and published within three or so years,

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*Copyright Act 1968* (Cth) s 33(2), as enacted. This article adopts the shorthand ‘life of the author plus 50 years’ and ‘life of the author plus 70 years’ for the purposes of simplicity.

<sup>27</sup> *Copyright Act 1968* (Cth) s 33(2) item 1.

<sup>28</sup> In *Oceantalk* (n 4) 572, 573–4 Burchett J ordered the Commonwealth, in its reliance on section 176, to provide particulars as to the originality and current copyright status of certain charts. It appears that the matter did not proceed.

<sup>29</sup> In recommending ‘that the special Crown subsistence and ownership provisions should be repealed’, one of the reasons given by the CLRC was that these provisions give the government ‘a privileged position compared with other copyright owners’: see CLRC (n 1) xxi. This article highlights circumstances where the government gains a privileged position from the general ownership provisions.

<sup>30</sup> The *Official Histories* can be accessed in full at: ‘Official History of Australia in the War of 1914–1918’, *Australian War Memorial* (Web Page) <<https://www.awm.gov.au/collection/C1416844>>.

<sup>31</sup> See KS Inglis, ‘Bean, Charles Edwin (1879–1968)’, *Australian Dictionary of Biography* (Web Page) <<http://adb.anu.edu.au/biography/bean-charles-edwin-5166>>.

Volume I was first published in 1921 and the last volume to be released, Volume VI, was published in 1942. The other ten volumes were released in the intervening period. Multiple editions of each volume were also subsequently published, the last being new editions of Volumes II and VII in 1944.

All involved in the production of the *Official History* — including Bean, the authors of each individual volume, publisher Angus & Robertson and even the printer of the books — had to sign comprehensive contracts with the Commonwealth of Australia. In the case of the Official Historian and the individual authors, the clauses of these contracts detailed delivery dates for manuscripts; payment of fees; copyright ownership of the volumes of the *Official History*; responsibility in the case of actions for libel; and, in Bean's case, a provision explicitly stating the volumes would not be subject to censorship. Despite the rigour of these agreements the 21-year writing of the *Official History* was a legally fraught experience; there were multiple calls for legal action and, in one instance, the threat of an injunction from the High Court of Australia.<sup>32</sup>

While the popularity of Bean and the *Official History* has changed in the nearly 100 years that have elapsed since the publication of Volume I, today the series is seen as one of the founding documents of the concepts of the 'Anzac spirit' and the 'Anzac legend'. With the exception of the photographic volume (Volume XII), all volumes of the *Official History* appear in full on the website of the Australian War Memorial ('AWM').<sup>33</sup> That website also features the following copyright notice:

The Australian War Memorial holds copyright for the text, maps and photographs contained in the Official Histories. Reproduction is allowed for private use only. For commercial reproduction, the permission of the Memorial must be obtained.<sup>34</sup>

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<sup>32</sup> This threat was made by Seaforth Simpson MacKenzie, author of Volume X of the *Official History* and at that time the Principal Registrar of the High Court. See Letter from CEW Bean to the Secretary, Department of Defence, 9 August 1926 (Australian War Memorial, AWM38, 3DRL 7953/13 PART 2).

<sup>33</sup> See 'Official History of Australia in the War of 1914–1918', *Australian War Memorial* (Web Page) <<https://www.awm.gov.au/collection/C1416844>>.

<sup>34</sup> 'First World War Official Histories Copyright Statement', *Australian War Memorial* (Web Page) <[https://www.awm.gov.au/official-histories/first\\_world\\_war/copyright](https://www.awm.gov.au/official-histories/first_world_war/copyright)>. Despite that statement, and while not strictly at issue in this article, it is unclear whether the Commonwealth of Australia or the AWM specifically is the current owner of copyright in the *Official History*. While the website cited indicates the 'Australian War Memorial holds copyright for the texts, maps and photographs contained in the Official Histories', another AWM page previously indicated that the *Official History* is subject to 'Commonwealth of Australia copyright'. See 'First World War Official Histories', *Australian War Memorial* (Web Page, 27 August 2018) <<https://www.awm.gov.au/collection/C1416531>>. In its 'Copyright' section, 'Commonwealth of Australia copyright' and 'Australian War Memorial copyright' are defined as two different concepts. See 'Copyright', *Australian War Memorial* (Web Page) <<https://www.awm.gov.au/about/organisation/corporate/copyright>>. While copyright in photographs

The existence of this statement indicates that the AWM believes copyright continues to subsist in the volumes of the *Official History*. However, when the series was being penned and published, section 18 of the *Copyright Act 1911* (Imp), discussed above, was in force. Section 18 provided that copyright would be owned by a government where a work was ‘prepared or published by or under the direction or control of His Majesty or any Government department’.<sup>35</sup> If that section applied, then, regardless of the existence of any contractual provisions, copyright should only have subsisted in the volumes of the series for 50 years from first publication. Although the *Copyright Act 1912* (Cth) was repealed pursuant to the *Copyright Act 1968* (Cth),<sup>36</sup> this application would be maintained by sections 176 and 177, in addition to the 50-year duration under section 180.

Still, this cannot be the case if the AWM considers it still ‘holds copyright for the text, maps and photographs contained in the Official Histories’. This interpretation suggests that the longer period of protection applies to the volumes of the *Official History* and that the AWM is seeking to rely on that longer term — at first, life of the author plus 50 years,<sup>37</sup> then life of the author plus 70 years following Australia’s 2005 term extension.<sup>38</sup>

This work unravels the copyright status of the *Official History*, using this as a case study for a broader evaluation of the complex interrelationship of the general and Crown copyright provisions contained in past and present Australian copyright legislation. In undertaking this analysis, this article uses archival material including documents and correspondence today fittingly collated and held by the AWM,<sup>39</sup> produced by Bean, the authors of each individual volume and members of government, including multiple Ministers for Defence. These materials shed light on how areas of law,

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and maps (see below (n 41) and accompanying text), which constitute separate items, could feasibly be separately owned by the AWM, it is unclear how copyright in the ‘text’ of the *Official History* could be owned without also holding copyright in the collective series.

<sup>35</sup> *Copyright Act 1911* (Imp) (n 7) s 18.

<sup>36</sup> *Copyright Act 1968* (Cth) ss 5(2), 6.

<sup>37</sup> *Copyright Act 1911* (Imp) (n 7) s 3; *Copyright Act 1968* (Cth) s 33(2), as enacted.

<sup>38</sup> *Copyright Act 1968* (Cth) s 33(2), as amended by *US Free Trade Agreement Implementation Act 2004* (Cth) sch 9 item 120. See also *Copyright Act 1968* (Cth) s 33(2), as amended by *Copyright Amendment (Disability Access and Other Measures) Act 2017* (Cth) sch 2 item 4.

<sup>39</sup> In 1922 then-Director of the Australian War Museum, John Treloar, recognised that as Official Historian Bean was making history as much as he was writing it, and subsequently requested Bean donate all material, including drafts and related correspondence, to the Australian War Museum. Bean agreed. See Letter from JL Treloar to CEW Bean, 17 October 1922; letter from CEW Bean to JL Treloar, 19 October 1922 (Australian War Memorial, AWM 38, 3DRL 6673/245). See also Michael Piggott, *A Guide to the Personal, Family and Official Papers of CEW Bean* (Australian War Memorial, 1983).

legislation and specific statutory provisions were understood to apply, or in fact misunderstood, in the context of the issues under consideration.<sup>40</sup>

This article proceeds as follows. Part II provides a brief history of the *Official History*, considering the conversation that initiated the creation an official history of the Australian experience in WWI; the development of the series; brief details of the contracts signed by the authors; an overview of issues encountered in the first few years of production; and a list of the published volumes. While the *Official History* itself is comprised of 12 volumes, this article examines the issues relating to the 11 text-based volumes and excludes a consideration of the primarily illustrated volume, Volume XII, the *Photographic Record of the War*.<sup>41</sup>

Part III then examines the issue of copyright. Although Bean originally believed he would own the copyright in the *Official History* it was eventually decided that this right would be owned by the Commonwealth of Australia. This Part examines the clauses contained in the author and publisher contracts; the statutory copyright provisions contained in the 1911 and 1968 Acts; how the government viewed the applicable provisions; and whether a case can be made that the Crown copyright-specific provisions applied to the *Official History*. Part III then analyses alternative Commonwealth ownership and the copyright status of the volumes today. It establishes that, despite the claim of the AWM that the series is still in copyright, three of the volumes have entered the public domain. Part IV concludes this article.

## II A BRIEF HISTORY OF THE *OFFICIAL HISTORY*

It is worth briefly exploring the concept of an ‘official war history’ before examining the making of the *Official History* in more detail. The AWM provides the following summary of what constitutes an ‘official history’, why such a project may be undertaken and the boundaries of the exercise:

Official histories are ‘official’ in the sense they are commissioned by government as the national record of Australia’s involvement in particular conflicts. The official historians are granted unrestricted access to closed period and security classified government records. The Australian official war histories contain the authors’ own interpretations and judgements and do not follow any official or government line.

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<sup>40</sup> Unless otherwise stated all archival material cited in this article, held by the AWM, National Archives of Australia (‘NAA’) and State Library of New South Wales (‘SLNSW’), has been viewed directly by the author.

<sup>41</sup> This article does not consider the status of the individual ‘maps and photographs contained in the Official Histories’ that the AWM also mentions in the ‘First World War Official Histories Copyright Statement’ (see discussion at n 34). It is the case that copyright could have subsisted separately in these items prior to their inclusion in the *Official Histories*, but consideration of copyright in these items would require a more detailed examination of these individual elements.

The works are the first published official record of Australia's involvement in war.<sup>42</sup>

To date, official histories of Australia's involvement in WWI, WWII, the Korean War and the South-East Asia conflicts have all been published, with volumes in the series on peacekeeping and post-Cold War operations either in print or being produced. A separate history of Australian involvement in East Timor, Afghanistan and Iraq is currently in development.<sup>43</sup>

The history of these official war histories, and the *Official History* under consideration here, begins in September 1914, shortly after Bean has been appointed as the Official War Correspondent for the Australian Imperial Force (the 'AIF'). At the commencement of hostilities Bean, a journalist and author, wrote to then-Minister for Defence, Senator Edward Millen, requesting that the Senator permit Bean to document the AIF campaign.<sup>44</sup> Although the Minister agreed, this plan did not come to fruition. But another opportunity arose when, following the 1914 federal election the Commonwealth Government contacted the Australian Journalists Association requesting assistance with the appointment of an Official War Correspondent.<sup>45</sup> Bean was appointed through a balloting process and in mid-September 1914 commenced this new role.<sup>46</sup>

As part of a series of initial meetings, Bean spoke with the new Minister for Defence, Senator George Foster Pearce,<sup>47</sup> and it was during this discussion that Senator Pearce asked whether Bean would consider writing the history of Australia's involvement in the war; Bean agreed.<sup>48</sup> John Connor sees approaching Bean specifically to act as post-war historian as a calculated decision on the part of Pearce, illustrating that the Senator 'realised that the AIF correspondent could play a role in his long-term desire to develop distinctly Australian national traditions.'<sup>49</sup> Given the legacy that emerged from the *Official History*, Bean ultimately fulfilled this duty. Indeed, early drafts of Bean's work for the *Official History* likely even exceeded Pearce's patriotic

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<sup>42</sup> 'Official Histories', *Australian War Memorial* (Web Page) <<https://www.awm.gov.au/learn/understanding-military-history/official-histories>>.

<sup>43</sup> Ibid.

<sup>44</sup> Martin Ball, 'The Story of the Story of Anzac' (PhD Thesis, University of Tasmania, 2001) 132.

<sup>45</sup> Ibid 132–3.

<sup>46</sup> Ibid 133.

<sup>47</sup> See B Beddie, 'Pearce, Sir George Foster (1870–1952)', *Australian Dictionary of Biography* (Web Page) <<http://adb.anu.edu.au/biography/pearce-sir-george-foster-7996>>.

<sup>48</sup> See CEW Bean, 'The Writing of the Australian Official History of the Great War: Sources, Methods and Some Conclusions' (1938) 24(2) *Royal Australian Historical Society Journal and Proceedings* 85, 85 ('The Writing of the Australian Official History'); Ball (n 44) 133.

<sup>49</sup> John Connor, *Anzac and Empire: George Foster Pearce and the Foundations of Australian Defence* (Cambridge University Press, 2011) 47.

hopes and expectations: a note by publisher George Robertson<sup>50</sup> on an early draft of Bean's first chapter for Volume I notes that Bean included 'Australia [or] Australians 18 times in 36 33 lines!'<sup>51</sup>

From the early stages of the war, while working as Official War Correspondent, Bean was already imagining what the planned history would ultimately entail,<sup>52</sup> contacting the Minister for Defence a number of times during the war with proposals for the history.<sup>53</sup> However, it is clear that Bean's goals, plans and suggested remuneration for the work changed as it became increasingly apparent that the history would need to be much more expansive than what was originally envisaged. This is understandable given how initial concepts of the conflict itself changed as the years progressed. Speaking in 1938, Bean noted that 'I thought then [in 1914] of a small one-volume work'.<sup>54</sup> That one volume became three.<sup>55</sup> Three became 'six or seven'.<sup>56</sup> By the time Bean submitted a full proposal for the series to the government, in August 1919, 12 individual volumes were listed.<sup>57</sup> With George Swinburne, Secretary of the Department of Defence,<sup>58</sup> Bean had also approached a number of international and Australian-based publishers to facilitate the publication of the multiple manuscripts; it was ultimately felt that, given the significance of the work to Australia, it should be published and printed by Australian companies.<sup>59</sup>

Although the Commonwealth Government took its time in finalising the contracts and details of the series — at a number of points Bean threatened to walk away from the work and sell the 300 notebooks he had filled during the war — by the end of

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<sup>50</sup> See Anthony Barker, 'Robertson, George (1860–1933)', *Australian Dictionary of Biography* (Web Page) <<http://adb.anu.edu.au/biography/robertson-george-8233>>.

<sup>51</sup> 'Angus & Robertson Papers Relating to C.E.W. Bean's History of World War I, 1919–1933' Item 1, 'Chapter I. Australia's Entry into the War' (State Library of New South Wales, MLMSS 7309) 2 (correction in original).

<sup>52</sup> Ball (n 44) 133; see also Letter from CEW Bean to Commander Pethebridge, 16 October 1914 (Australian War Memorial, AWM38, 3DRL 6673/270) 3.

<sup>53</sup> Letter from CEW Bean to Senator George Pearce, 24 November 1916 (Australian War Memorial, AWM38, 3DRL 6673/12); Letter from CEW Bean to Senator George Pearce, 14 December 1917, headed 'First Draft' (Australian War Memorial, AWM38, 3DRL 6673/39); Letter from CEW Bean to Senator George Pearce, 14 December 1917, headed 'Final Draft' (Australian War Memorial, AWM38, 3DRL 6673/39); 'Australian Records of the War', 14 August 1919 (Australian War Memorial, AWM38, 3DRL 6673/11).

<sup>54</sup> Bean, 'The Writing of the Australian Official History' (n 48) 85.

<sup>55</sup> Letter from CEW Bean to Senator George Pearce, 24 November 1916 (n 53).

<sup>56</sup> Letter from AH Dakers to CEW Bean, 6 November 1918 (Australian War Memorial, AWM38, D3) 1.

<sup>57</sup> 'Australian Records of the War' (n 53) 1.

<sup>58</sup> See Alison Patrick, 'Swinburne, George (1861–1928)', *Australian Dictionary of Biography* (Web Page) <<http://adb.anu.edu.au/biography/swinburne-george-8729>>.

<sup>59</sup> Letter from Cassell & Company Ltd to CEW Bean, 10 December 1918 (Australian War Memorial, AWM38, D3); 'Australian Records of the War' (n 53) 2–4.

1919 official work on the *Official History* was officially underway.<sup>60</sup> Bean was to be responsible for writing the first six volumes of the series, in addition to collating the photographic volume,<sup>61</sup> with Henry Somer Gullett,<sup>62</sup> Frederic Morley Cutlack,<sup>63</sup> Arthur Wilberforce Jose,<sup>64</sup> Seaforth Simpson MacKenzie<sup>65</sup> and Thomas William Heney<sup>66</sup> to each write one of the five remaining volumes, on issues ranging from the Australian navy to the Australian home front experience. Heney later resigned on account of illness and was replaced by Ernest Scott.<sup>67</sup>

As part of these arrangements, Bean, Gullett, Cutlack, Jose, MacKenzie, Heney and then Scott each entered into contracts with the Commonwealth of Australia, with multiple drafts and copies of these agreements today held by the National Archives of Australia, the State Library of New South Wales and in Bean's files at the AWM.<sup>68</sup>

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<sup>60</sup> See generally Letter from Charles Bean to the Acting Minister for Defence, 28 September 1919 (Australian War Memorial, AWM38, 3DRL 6673/39); Letter from Charles Bean to the Secretary for Defence, 7 October 1919 (Australian War Memorial, AWM38, 3DRL 6673/39).

<sup>61</sup> 'Australian Records of the War' (n 53) 1.

<sup>62</sup> See AJ Hill, 'Gullett, Sir Henry Somer (Harry) (1878–1940)', *Australian Dictionary of Biography* (Web Page) <<http://adb.anu.edu.au/biography/gullett-sir-henry-somer-harry-448>>.

<sup>63</sup> See AJ Sweeting, 'Cutlack, Frederic Morley (1886–1967)', *Australian Dictionary of Biography* (Web Page) <<http://adb.anu.edu.au/biography/cutlack-frederic-morley-5859>>.

<sup>64</sup> See Ross Lamont, 'Jose, Arthur Wilberforce (1863–1934)', *Australian Dictionary of Biography* (Web Page) <<http://adb.anu.edu.au/biography/jose-arthur-wilberforce-6885>>.

<sup>65</sup> See Ronald McNicoll, 'MacKenzie, Seaforth Simpson (1883–1955)', *Australian Dictionary of Biography* (Web Page) <<http://adb.anu.edu.au/biography/mackenzie-seaforth-simpson-7390>>.

<sup>66</sup> See Ken Stewart, 'Heney, Thomas William (1862–1928)', *Australian Dictionary of Biography* (Web Page) <<http://adb.anu.edu.au/biography/heney-thomas-william-6635>>.

<sup>67</sup> See Michael McKernan, 'Introduction to University of Queensland Press Edition' in Ernest Scott, *The Official History of Australia in the War of 1914–1918 — Volume XI: Australia During the War*, ed Robert O'Neill (University of Queensland Press, 1989 ed, 1989) xxxi, xxxiii–iv; see also Kathleen Fitzpatrick, 'Scott, Sir Ernest (1867–1939)', *Australian Dictionary of Biography* (Web Page) <<http://adb.anu.edu.au/biography/scott-sir-ernest-8367>>.

<sup>68</sup> See generally 'Agreement With Dr CEW Bean Re Compilation of Official History of Australia in War' (National Archives of Australia, A6074, PO8446); 'Agreement with Mr CEW Bean in connection with National Histories' (National Archives of Australia, A3280, P6079); 'Angus & Robertson papers relating to CEW Bean's History of World War I, 1919–1933' (State Library of New South Wales, MLMSS 7309, Item 3); 'Official History, 1914–18 War: Records of Charles EW Bean, Official Historian Papers, 1919–42' (Australian War Memorial, AWM38, 3DRL 6673/11), which contains typescripts on the scheme for three types of official histories and on costs relating to the official history, copies of agreements for the official historians

In each case the relevant agreement detailed the work required by the author, including the number of pages and photographs required. For example, clause 1 of the contract between the Commonwealth and Henry Somer Gullett stated in part that:

T[he] Author shall write for the Commonwealth a volume of History entitled 'The Story of Sinai and Palestine' to form one of the twelve volumes set out in the Schedule hereto jointly to be known as the National Histories. The said volume shall consist of 650 pages each containing about 400 words including 100 pages of photographs.<sup>69</sup>

The agreements also stipulated when work was due;<sup>70</sup> what the author would be paid and, if in instalments, when;<sup>71</sup> issues of delay;<sup>72</sup> issues of libel and indemnification;<sup>73</sup> and Commonwealth ownership of copyright in the work, discussed in greater detail in Part III below. In the case of Bean's contract, in addition to further information on his role as Official Historian and work as editor,<sup>74</sup> his agreement also contained the following proviso in clause 9: 'T[he] Commonwealth shall not censor or alter the

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other than Bean, and Bean's correspondence with various officials of the Department of Defence; 'Official History, 1914–18 War: Records of Charles EW Bean, Official Historian: Correspondence, 1914–1956' (Australian War Memorial, AWM38, 3DRL 6673/30A), which contains Agreement between the Official Historian and the Commonwealth, and numerous other correspondents) 'Official History, 1914–18 War: Records of Charles EW Bean, Official Historian: Papers, 1919–32) (Australian War Memorial, AWM38, 3DRL 6673/32), which concerns the contract between the government and Angus and Robertson to publish the official history and comprise copies of the 1920 agreement and correspondence with the Department of Defence and Angus & Robertson; 'Official History, 1914–18 War: Records of Charles E W Bean, Official Historian: Agreements, 1919' (Australian War Memorial, AWM38, 3DRL 6673/38), which comprises a minute from the Department of Defence and agreements signed by Bean, F M Cutlack, Sir Henry Gullett, SS Mackenzie, AW Jose and TW Heney to write various parts of the official history).

<sup>69</sup> See, eg, Draft of Agreement with Henry Somer Gullett (Australian War Memorial, AWM38, 3DRL 6673/11) cl 1.

<sup>70</sup> Ibid cl 7.

<sup>71</sup> Ibid cl 11; Agreement between Charles Edwin Woodrow Bean and the Commonwealth of Australia, 12 February 1919 (State Library of New South Wales, MLMSS 7309 Item 3), cl 4. Note that, despite the fact that the contract was dated February 1919 it was in fact retrospective, as letters cited in this article illustrate negotiations were still ongoing in late 1919.

<sup>72</sup> See, eg, Agreement between Charles Edwin Woodrow Bean and the Commonwealth of Australia (n 71) cl 16.

<sup>73</sup> See, eg, Draft of Agreement with Frederick [sic] M Cutlack (Australian War Memorial, AWM38, 3DRL 6673/38) cls 9-10. This was particularly important in the case of Jose's volume on the Navy: see generally Stephen Ellis, 'The Censorship of the Official Naval History of Australia in the Great War' (1983) 20(80) *Historical Studies* 367.

<sup>74</sup> Agreement between Charles Edwin Woodrow Bean and the Commonwealth of Australia (n 71) cls 1–3.

National Histories as written annotated or edited by the Official Historian.<sup>75</sup> In his initial proposal to the government Bean was insistent that the *Official History* not be subject to external censorship,<sup>76</sup> with the exception of Volume IX, on the Australian Navy.<sup>77</sup>

These author contracts also placed certain responsibilities on the Commonwealth, including the requirement that it enter into a publishing agreement for the printing and distribution of the series. Bean's contract, for example, included the following clause, arguably the antithesis of plain legal drafting:

T[he] Commonwealth shall enter into a contract or contracts with an Australian publisher or publishers for the publication of the National Histories in Australia and in such other places as the Minister shall determine and shall take all steps which are in the opinion of the Minister reasonable to provide for such publication to be in good style and in respect of each volume of the National Histories as soon as practicable after delivery of the edited manuscript therefor by the Official Historian to the person or at the place directed by the Minister.<sup>78</sup>

As noted above, the Commonwealth entered into an agreement with noted local publisher Angus & Robertson for the production of the series.<sup>79</sup>

While Bean's first volume was published in 1921,<sup>80</sup> just as it had become evident to Bean that one, three, six or seven volumes would not be enough for capturing Australia's involvement in WWI, it quickly became apparent that the five years provided by his contract would not be enough time to complete the series. As Bean commented in 1938, while the series was still underway, '[e]ach volume has taken, on an average, slightly over three years to write'<sup>81</sup> with a general word length of 300 000 per title.<sup>82</sup>

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<sup>75</sup> Ibid cl 9 (emphasis in original).

<sup>76</sup> 'Australian Records of the War' (n 53) 2.

<sup>77</sup> See Bean, 'The Writing of the Australian Official History' (n 48) 86; Ellis (n 73); Ross Lamont, 'Introduction to University of Queensland Press Edition' in Arthur W Jose, *The Official History of Australia in the War of 1914–1918: Volume IX: The Royal Australian Navy 1914–1918*, ed Robert O'Neill (University of Queensland Press, 1987 reprint of 1929 edition) xxiii.

<sup>78</sup> Agreement between Charles Edwin Woodrow Bean and the Commonwealth of Australia (n 71) cl 7; see also Draft of Agreement with Henry Somer Gullett (n 69) cl 2.

<sup>79</sup> See generally 'Copy of an Agreement Dated 5th February 1920, Between The Commonwealth of Australia and Angus and Robertson Limited For the Printing, Binding, Publication, and Sale of Literary Work dealing with Australia's Part in the War of 1914–1918' (Australian War Memorial, AWM38, 3DRL 6673/32).

<sup>80</sup> CEW Bean, *The Official History of Australia in the War of 1914–1918 – Volume I: The Story of ANZAC from the Outbreak of War to the End of the First Phase of the Gallipoli Campaign, May 4, 1915* (Angus & Robertson, 1921).

<sup>81</sup> Bean, 'The Writing of the Australian Official History' (n 48) 89.

<sup>82</sup> Ibid 93.

In 1924 Bean applied to the Minister for Defence for the first time for an extension of his contract; his tenure as Official Historian was extended for another five years without issue.<sup>83</sup> Both Bean and then-Minister for Defence Eric Bowden were philosophical about the delay, with the Minister noting the value that the copyright being generated would have for the government.<sup>84</sup>

A similar extension was also approved without controversy by the Department of Defence in 1929,<sup>85</sup> but a few years' later the *Official History* attracted the ire of the Auditor-General, who was critical of the delay and cost, and even argued that there was a lack of public interest in the series.<sup>86</sup> Still, the work continued and the final text volume, *The Australian Imperial Force in France During the Allied Offensive* (Volume VI), was published in 1942, more than two decades after the events documented took place.

Despite the time elapsed and the issues that emerged during the course of writing, all 12 volumes as proposed in Bean's original submission to the Commonwealth Government were ultimately completed. Table 1 provides the basic details for each of the 11 textual volumes; as noted above Volume XII, the photographic volume, is not considered here.

**Table 1: Details of the text-based volumes of the *Official History***

Volume	Title of Volume	Author	Year of First Publication
I	<i>The Story of ANZAC from the Outbreak of War to the End of the First Phase of the Gallipoli Campaign, May 4, 1915</i>	Charles Bean	1921
II	<i>The Story of ANZAC from 4 May, 1915 to the Evacuation of the Gallipoli Peninsula</i>	Charles Bean	1924
III	<i>The Australian Imperial Force in France: 1916</i>	Charles Bean	1929
IV	<i>The Australian Imperial Force in France: 1917</i>	Charles Bean	1933
V	<i>The Australian Imperial Force in France during the Main German Offensive, 1918</i>	Charles Bean	1937

<sup>83</sup> See Letter from WA Newman to CEW Bean, 5 June 1924 (Australian War Memorial, AWM38, 3DRL 6673/11); Letter from the Acting Secretary, Department of Defence to the Commonwealth Crown Solicitor, 17 June 1924 (National Archives of Australia, A3280, P6079); Letter from the Commonwealth Crown Solicitor to the Department of Defence, 23 June 1924 (National Archives of Australia, A3280, P6079).

<sup>84</sup> EK Bowden 'Australia War Histories. Renewal of Engagement of Official Historian (Mr CEW Bean)', 4 June 1924 (Australian War Memorial, AWM 38, 3DRL 6673/11), 1; cf CEW Bean to the Minister for Defence, 'Position Concerning War Histories' (Australian War Memorial, AWM 38, 3DRL 6673/11) 2.

<sup>85</sup> Letter from Malcolm Shepherd, Secretary of the Department of Defence, to CEW Bean, July 1929 (Australian War Memorial, AWM 38, 3DRL 6673/11).

<sup>86</sup> 'Extract from Annual Report of Commonwealth Auditor-General for the Year Ended 30 June 1931' (Australian War Memorial, AWM 38, 3DRL 6673/11) 1–3.

Volume	Title of Volume	Author	Year of First Publication
VI	<i>The Australian Imperial Force in France during the Allied Offensive</i>	Charles Bean	1942
VII	<i>The Australian Imperial Force in Sinai and Palestine: 1914 – 1918</i>	Henry Gullett	1923
VIII	<i>The Australian Flying Corps in the Western and Eastern Theatres of War 1914 – 1918</i>	Frederic Cutlack	1923
IX	<i>The Royal Australian Navy: 1914 – 1918</i>	Arthur Jose	1928
X	<i>The Australians at Rabaul: The Capture and Administration of the German Possessions in the Southern Pacific</i>	Seaforth Simpson MacKenzie	1927
XI	<i>Australia During the War</i>	Ernest Scott	1936

How copyright applied and continues to apply to the *Official History* and its volumes, and the complicated relationship that this highlights in relation to the general and Crown ownership provisions of Australia’s copyright statutes, is now examined in more detail.

### III CROWN OWNERSHIP OF COPYRIGHT AND THE *OFFICIAL HISTORY*

#### *A Copyright and Contracts*

Bean began to consider the issue of copyright almost immediately after his September 1914 meeting with the Minister for Defence. In a letter to Commander Samuel Pethebridge dated 16 October 1914, it is clear that Bean had a good understanding of copyright, its value and the royalties it could generate.<sup>87</sup> He commented that ‘[m]y payment for this [history] would be the usual royalty on the book if published by the Commonwealth in Australia, and the rights for the publication of the book in other countries’.<sup>88</sup> Bean appeared so certain that this arrangement would proceed that in late 1918, as WWI was finally drawing to a close, he exchanged multiple letters with his international agent, Curtis Brown Ltd, and publisher Cassell & Company,<sup>89</sup> with a view to finalising publication of the work.<sup>90</sup> A contract between Bean and Cassell & Company was even drawn up by Curtis Brown Ltd, for a six-volume version

<sup>87</sup> See Granville Allen Mawer, ‘Pethebridge, Sir Samuel Augustus (1862–1918)’, *Australian Dictionary of Biography* (Web Page) <<http://adb.anu.edu.au/biography/pethebridge-sir-samuel-augustus-8029>>.

<sup>88</sup> Letter from CEW Bean to Commander Pethebridge (n 52) 3.

<sup>89</sup> Cassell & Company had published a number of books by Bean, including CEW Bean (ed), *The Anzac Book* (Cassell & Company, 1916) and CEW Bean, *In Your Hands, Australians* (Cassell & Company, 1918).

<sup>90</sup> Letter from AH Dakers, Curtis Brown Ltd to CEW Bean, 6 November 1918 (Australian War Memorial, AWM38, D3) 1.

of the proposed history;<sup>91</sup> however, both Cassell's hesitancy at publishing such an expansive, expensive work and the decision to publish using an Australian company quelled this arrangement.<sup>92</sup>

As noted above, when details for the proposed history were being finalised by the Commonwealth Government all contracts included a provision that the Commonwealth would own copyright in the work generated. It is not clear when this was decided, but it is understandable that the Commonwealth, rather than Bean, would own copyright given the inclusion of additional authors in the series.<sup>93</sup> Still, from his correspondence with the Minister for Defence it is apparent that Bean saw the forfeiture of his legal rights in the work as one justification for asking for a higher salary than had been initially proposed. In a letter to the Minister for Defence dated 16 August 1919, Bean opined:

That the Government obtains the great work of my lifetime, I retaining no further share in the possession of it, and the Government obtaining all future rights. I may explain this by saying that the work involves the final use, by the writer, of a vast private record of the war — 300 volumes of private notes and diary — written daily and nightly entirely apart from his office of war correspondent ... This is a purely personal record having no connection with the Official war records, but at least three quarters of the main history will be based on it. These records have been bequeathed by me to the Commonwealth and on my death will go the nation ...<sup>94</sup>

Bean attained that higher salary and his contract contained the following clause:

8. T[he] Copyright of the said History shall belong to the Commonwealth.<sup>95</sup>

The agreements with authors Gullett, Cutlack, Jose, MacKenzie, Heney and Scott contained a similar provision:

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<sup>91</sup> Draft Agreement between CEW Bean and Cassell & Company Limited, 1919 (Australian War Memorial, AWM38, D3).

<sup>92</sup> Letter from Cassell & Company Ltd to CEW Bean, 10 December 1918 (Australian War Memorial, AWM38, D3); Letter from CEW Bean to CE Gardiner, Cassell & Company, 25 October 1919 (Australian War Memorial, AWM38, D3); Letter from CEW Bean to AH Dakers, Curtis Brown Ltd, 31 October 1919 (Australian War Memorial, AWM38, D3).

<sup>93</sup> The August 1919 proposal states the following recommendation to the Commonwealth Government, made by George Swinburne: 'That the Government should retain the copyright of all the books written and issued under its auspices.' See 'Australian Records of the War' (n 53) 6.

<sup>94</sup> Letter from CEW Bean to the Minister for Defence, 16 August 1919 (Australian War Memorial, AWM38, 3DRL 6673/39) 1. Bean's final comment was not simply rhetoric; those records are today physically held by the Australian War Memorial.

<sup>95</sup> Agreement between Charles Edwin Woodrow Bean and the Commonwealth of Australia, 12 February 1919 (State Library of New South Wales, MLMSS 7309, Item 3) cl 8.

3. T[he] Copyright of the said volume shall belong to the Commonwealth.<sup>96</sup>

The government contract with *Official History* publisher Angus & Robertson also featured a clause relating to copyright:

27. S[ubject] to the provisions of this Agreement the whole right title and interest in the manuscript and the copyright in the work shall remain in the Commonwealth.<sup>97</sup>

Given the existence of these clauses, Commonwealth ownership of copyright in the *Official History* seems uncontroversial. The question that remains is *which* provisions of the relevant copyright statute, the *Copyright Act 1911* (Imp) (in force in Australia pursuant to the *Copyright Act 1912* (Cth)), applied to the *Official History* when the works were written and published between 1921 to 1942 and, by virtue of those provisions, the applicable term of copyright. When the 1912 statute was repealed and replaced in the Commonwealth by the *Copyright Act 1968* (Cth),<sup>98</sup> the copyright subsisting in the *Official History* would have continued pursuant to the relevant provisions of that new legislation.

As noted above, the specific Crown copyright section of the 1911 statute, s 18, granted a 50-year period of protection from first publication, with that duration maintained in the 1968 Act. If that term applied, all volumes of the *Official History* should now be in the public domain, the last (Volume VI) since 1 January 1993. However, if s 18 had no effect, then the general provisions would have applied and life of the author plus 50 years, now extended to life of the author plus 70 years, would be the applicable term of copyright. Information on the AWM website indicates a belief that copyright continues to subsist in all volumes of the *Official History*; as the analysis below indicates, it is difficult to take such an unequivocal position.

### *B Subsistence and Ownership of Copyright for Crown-related works and the Official History*

It is first useful to examine the relevant provisions of the *Copyright Act 1911* (Imp) in force at the time of the writing of the series. Only one section, s 1(1), provided

<sup>96</sup> Draft of Agreement with Frederic Morley Cutlack (Australian War Memorial, AWM 38, 3DRL 6673/11) cl 3; Draft of Agreement with Henry Somer Gullett (Australian War Memorial, AWM 38, 3DRL 6673/11) cl 3; Draft of Agreement with Seaforth Simpson MacKenzie (Australian War Memorial, AWM 38, 3DRL 6673/11) cl 3; Draft of Agreement with Ernest Scott (Australian War Memorial, AWM 38, 3DRL 6673/11) cl 3; Agreement with Arthur Wilberforce Jose (Australian War Memorial, AWM 38, 3DRL 6673/38) cl 3) (the Agreement uses the incorrect name ‘Arthur William Jose’); Agreement with Thomas W Heney (cl 3) .

<sup>97</sup> ‘Copy of an Agreement Dated 5th February, 1920, Between The Commonwealth of Australia and Angus and Robertson Limited For the Printing, Binding, Publication, and Sale of Literary Work dealing with Australia’s Part in the War of 1914-1918’ (Australian War Memorial, AWM 38, 3 DRL 6673/32) cl 27.

<sup>98</sup> *Copyright Act 1968* (Cth) ss 5–6.

for the subsistence of copyright. The creation of all works had to meet the following requirements, regardless of whether copyright would be owned by the author, an employer, or even the Crown:<sup>99</sup>

Subject to the provisions of this Act, copyright shall subsist throughout the parts of His Majesty's dominions to which this Act extends for the term hereinafter mentioned in every original literary dramatic musical and artistic work, if—

- (a) in the case of a published work, the work was first published within such parts of His Majesty's dominions as aforesaid; and
- (b) in the case of an unpublished work, the author was at the date of the making of the work a British subject or resident within such parts of His Majesty's dominions as aforesaid;

but in no other works, except so far as the protection conferred by this Act is extended by Orders in Council thereunder relating to self-governing dominions to which this Act does not extend and to foreign countries.<sup>100</sup>

While the Act provided that the author would be the first owner of copyright in his or her work,<sup>101</sup> it also contained alternative ownership arrangements in instances of, for example, employment or assignment.<sup>102</sup> In the latter case, s 5(2) provided

[t]he owner of the copyright in any work may assign the right, either wholly or partially, and either generally or subject to limitations to the United Kingdom or any self-governing dominion or other part of His Majesty's dominions to which this Act extends, and either for the whole term of the copyright or for any part thereof, and may grant any interest in the right by licence, but no such assignment or grant shall be valid unless it is in writing signed by the owner of the right in respect of which the assignment or grant is made, or by his duly authorized agent ...<sup>103</sup>

Unless another provision applied — as will be discussed below — the applicable term of protection for all works was contained in s 3. Regardless of whether copyright was owned by the author, or if ownership of the copyright was vested in an employer, or was assigned to another party, copyright would subsist for 'the life of the author and a period of fifty years after his death'.<sup>104</sup> In the case of collective

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<sup>99</sup> *A-G (NSW) v Butterworth & Co (Australia) Ltd* (1938) 38 SR (NSW) 195, 258–9. This is also in contrast to the position today, where under the *Copyright Act 1968* (Cth) copyright can subsist in a work pursuant to either s 32 or s 176(1).

<sup>100</sup> *Copyright Act 1911* (Imp) (n 7) s 1(1).

<sup>101</sup> *Ibid* s 5(1).

<sup>102</sup> *Ibid* ss 5(1)(b), 5(2).

<sup>103</sup> *Ibid* s 5(2).

<sup>104</sup> *Ibid* s 3.

works, the owner would hold copyright in each contribution for life of the author plus 50 years;<sup>105</sup> special provision was made for the duration of copyright in works of joint authorship.<sup>106</sup>

One of the alternative terms of protection provided by the 1911 Act concerned works created in circumstances where the specific Crown copyright provision, s 18, would apply. If the criteria in s 18 were met, then not only would the Crown own copyright in the relevant work, but copyright would subsist for a different period to that identified in s 3. Section 18 stated that:

Without prejudice to any rights or privileges of the Crown, where any work has, whether before or after the commencement of this Act, been prepared or published by or under the direction or control of His Majesty or any Government department, the copyright in the work shall, subject to any agreement with the author, belong to His Majesty, and in such case shall continue for a period of fifty years from the date of the first publication of the work.<sup>107</sup>

For s 18 to apply, however, the work in question needed to be ‘prepared or published by or under the direction or control of His Majesty or any Government department’.

Copyright would have thus subsisted in each volume of the *Official History* pursuant to s 1(1), but if one or more of the elements of s 18 was satisfied — that the work was ‘prepared or published by or under the direction or control of His Majesty or any Government department’ — copyright would immediately have vested in the Crown. The applicable period in this instance would be 50 years from first publication. If s 18 did not apply, then, as before, copyright would subsist in each volume pursuant to s 1(1) but the author agreements would have acted as a valid assignment of copyright from the author to the Commonwealth, as permitted by s 5(2). The volume would be protected for the life of the author plus 50 (now 70) years.

In determining the likely position, it is first useful to examine how the Commonwealth Government viewed copyright as it applied to the *Official History*, at the time of the writing of the series. Correspondence between Bean and a number of government departments, penned eight years after the first publication of Volume I, is helpful in this regard.

In mid-1929 Bean wrote to the Secretary of the Department of Defence, and then to the Crown Solicitor’s Office, expressing concerns regarding the copyright status of the *Official History*.<sup>108</sup> These concerns were unfounded, but the Deputy Crown

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<sup>105</sup> See LCF Oldfield, *The Law of Copyright* (Butterworth & Co, 1912) 20. The term ‘collective work’ was defined in the interpretation section of the 1911 Act: see *Copyright Act 1911* (Imp) s 35(1). It will be discussed in more detail below.

<sup>106</sup> *Copyright Act 1911* (Imp) (n 7) s 16(1); see also Oldfield (n 105) 64–6.

<sup>107</sup> *Copyright Act 1911* (Imp) (n 7) s 18.

<sup>108</sup> Letter from CEW Bean to the Secretary, Department of Defence, 3 May 1929 (National Archives of Australia, A1952, 580/2/4414).

Solicitor prepared a comprehensive memorandum in response, highlighting the practice of the Commonwealth Government in relation to Crown copyright.<sup>109</sup> This policy dated back to early 1914, following receipt of a 1912 Treasury Minute from the British Government that built on an earlier document of this type created in 1887.<sup>110</sup> That document noted the various types of materials produced by government and the ‘considerable cost’ expended in the creation of some of these publications, including ‘Official books’, ‘Literary or quasi-literary works’ and ‘Charts and Ordnance Maps’.<sup>111</sup> In Australia, the 1912 Minute was subsequently distributed to major Commonwealth departments by Solicitor General Robert Garran, with additional advice regarding registration of copyright in these creations.<sup>112</sup> Incidentally, while the Commonwealth Government had sought to register copyright in Bean’s dispatches as Official War Correspondent,<sup>113</sup> as per this earlier advice, by failing to register the copyright in the *Official History* it had not followed its own stated procedure.<sup>114</sup>

The memo of the Deputy Crown Solicitor is of additional significance here as it provides further insight as to how the Crown Solicitor’s Office, responsible for the drafting of the author contracts, viewed copyright in the *Official History*. In the first few paragraphs of the memo it was simply stated that:

The copyright in the Official History of the War apparently belongs to the Commonwealth by virtue of the application in Australia by Sec. 8 of the Copyright Act 1912 of Section 18 of the Copyright Act 1911 (1 & 2 Geo. V, Ch. 46).<sup>115</sup>

On that basis, in the view of the Commonwealth Government, s 18 and thus the 50 year period of protection applied to the *Official History*. However, as noted above, in order for Commonwealth ownership of copyright in the *Official History* to be founded in section 18, the series needed to be ‘prepared or published by or under the direction or control of His Majesty or any Government department’. There were

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<sup>109</sup> See generally ‘Re Copyright in Australian Official History of the War’, 22 May 1929 (National Archives of Australia, A432, 1929/1720).

<sup>110</sup> ‘Treasury Minute Dated 28th. June, 1912’ (National Archives of Australia, A2, 1914/3164) 1; see also Oldfield (n 105) 111–13; *A-G (NSW) v Butterworth & Co (Australia) Ltd* (n 99), 227; *Copyright Agency Ltd v New South Wales* (2007) 159 FCR 213, 247 [177] (Finkelstein J).

<sup>111</sup> ‘Treasury Minute Dated 28th. June, 1912’ (National Archives of Australia, A2, 1914/3164) 1.

<sup>112</sup> Letter from RR Garran to the Secretary, Prime Minister’s Department, 19 January 1914 (National Archives of Australia, A2, 1914/3164).

<sup>113</sup> See letter from the Assistant Secretary, Department of Defence to the Registrar of Copyrights, 6 January 1915 (National Archives of Australia, A1336, 3986).

<sup>114</sup> As the Solicitor General pointed out to Bean, however, this would not preclude any future action for infringement: see letter from RR Garran to CEW Bean, 5 June 1929 (National Archives of Australia, A432, 1929/1720) 1. See also *Copyright Act 1912* (Cth) s 26.

<sup>115</sup> Letter from the Deputy Crown Solicitor to the Crown Solicitor, 22 May 1929 (National Archives of Australia, A432, 1929/1720) 1.

multiple avenues for Crown ownership under that provision: section 18 would apply where a work was prepared by the Crown;<sup>116</sup> where a work was prepared under the direction or control of the Crown; where a work was published by the Crown; or where the work was published under the direction or control of the Crown.<sup>117</sup> To understand whether any of those options applied in the case of the *Official History*, a closer analysis of the terms ‘prepared or published by or under the direction or control’ of government is needed.

In its 2007 decision in *Copyright Agency Ltd v New South Wales* (2007) 159 FCR 213, the Full Court of the Federal Court considered copyright ownership in a series of survey plans. The case was referred to the Federal Court from the Copyright Tribunal, which normally would have simply sought to determine an applicable licence fee under s 183 of the *Copyright Act 1968*, for use of the survey plans by the New South Wales Government.<sup>118</sup> The State of New South Wales argued it was not liable for such fees, however, first on the basis that it was the owner of the copyright in the survey plans pursuant to either s 176(2) or s 177 of the 1968 legislation.<sup>119</sup> In the alternative it argued that a licence other than that stated in section 183 applied, and as a result it did not need to pay any fees for its reproduction of the survey plans.<sup>120</sup> In the Full Federal Court the State of New South Wales was successful on the latter point;<sup>121</sup> this was overturned on appeal in a unanimous judgment of the High Court.<sup>122</sup>

Justice Emmett, with whom Lindgren J concurred and Finkelstein J concurred in general, made the following comments in the course of his judgment on the application of the terms ‘by’, ‘direction’ and ‘control’:

‘By’ is concerned with those circumstances where a servant or agent of the Crown brings the work into existence for and on behalf of the Crown. ‘Direction’ and ‘control’ are not concerned with the situation where the work is made *by* the Crown but with situations where the person making the work is subject to either the direction or control of the Crown as to how the work is to be made. In the copyright context, that may mean how the work is to be expressed in a material form.

<sup>116</sup> Speaking of the similar provision contained in the 1968 statute, section 176, Finkelstein J noted in *Copyright Agency Ltd v New South Wales* (2007) 159 FCR 213 that ‘[a]s regards a work made by the Crown, we are necessarily dealing with a fiction. Generally for copyright purposes a work is made by its author. What s 176 contemplates is that, in certain circumstances, the act of the author in making a work is to be attributed to the Crown.’: at 248 [183].

<sup>117</sup> In *Copyright Agency Ltd v New South Wales* (2007) 159 FCR 213 Finkelstein J created a similar list in relation to ss 176 and 177 of the *Copyright Act 1968*: at 248 [182].

<sup>118</sup> *Ibid* 215–16.

<sup>119</sup> *Ibid* 216–17.

<sup>120</sup> *Ibid* 217.

<sup>121</sup> *Ibid* 243–4.

<sup>122</sup> *Copyright Agency Ltd v New South Wales* (2008) 233 CLR 279. See also *Copyright Agency Ltd v New South Wales* (2013) 102 IPR 85.

*Direction* might mean order or command, or management or control (Macquarie Dictionary Online). *Direction* might also mean instructing how to proceed or act, authoritative guidance or instruction, or keeping in right order management or administration (Oxford English Dictionary Online).

*Control* might mean the act or power of controlling, regulation, domination or command (Macquarie Dictionary Online). *Control* might also mean the fact of controlling or of checking and directing action, the function or power of directing and regulating, domination, command, sway: *Shorter Oxford English Dictionary* (5th ed, Oxford University, 2002).

...

The question is whether the Crown is in a position to determine whether or not a work will be made, rather than simply determining that, *if it is to be made at all*, it will be made in a particular way or in accordance with particular specifications.<sup>123</sup>

On the last point and in a similar vein, Finkelstein J made the following comment after considering the application of section 18 of the 1911 statute in the 1926 decision *British Broadcasting Co v Wireless League Gazette Publishing Co*:<sup>124</sup>

[M]erely to specify the form that a work should take does not constitute a direction to prepare the work or amount to control over its preparation. What is lacking is authority to give the direction to prepare the work or to control the manner in which the work was prepared.<sup>125</sup>

### C *Ownership and the Copyright Status of the Official History*

A number of points from this discussion can be used to inform an analysis of Crown ownership, and thus the relevant duration of protection, in the specific case of the *Official History*. As to the first element of s 18, the precursor to the provisions discussed by Emmett J,<sup>126</sup> whether a work was prepared by, or under the direction or control of the government, the role of the Crown in initiating the creation of the work is an important factor. In the case of the *Official History*, from the discussion at the start of Part II it is apparent that the Minister for Defence, Senator George Pearce, was responsible for the *concept* of the *Official History*. On that basis, it is

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<sup>123</sup> *Copyright Agency Ltd v New South Wales* (2007) 159 FCR 213, 238 (emphasis in original). These comments were in part cited by Besanko J in *Insight SRC IP Holdings Pty Ltd v Australian Council for Educational Research Ltd* (n 5) 573 [43].

<sup>124</sup> [1926] 1 Ch 433.

<sup>125</sup> *Copyright Agency Ltd v New South Wales* (2007) 159 FCR 213, 250 [129].

<sup>126</sup> There are some differences: for example, *Copyright Act 1911* (Imp) (n 7) s 18 used the term ‘prepared’ while *Copyright Act 1968* (Cth) ss 176(1) and (2) adopt the term ‘made by’. *Copyright Act 1911* (Imp) (n 7) s 18 also used the term ‘published’, whereas *Copyright Act 1968* (Cth) s 177 adopts the phrase ‘first published’. These aspects are not relevant for the purpose of the present discussion.

arguable that the *Official History* was ultimately made pursuant to the ‘direction’ of the government, with the Minister for Defence giving the ‘order or command’ for creation of the work.

That, however, seems to place significant emphasis on what appears to have been a simple conversation, and the importance of the conversation is potentially overstated when viewed as a *direction* to create the *Official History*. As Part II illustrated, Bean was responsible for many of the logistical decisions behind the creation of the *Official History*, determining, for example, the number of volumes in the series and the topics of each volume.<sup>127</sup> It may be that the contractual stipulations as to page lengths, words and photograph numbers could also be considered a ‘direction’ or assertion of ‘control’; as a result of the factual circumstances of the case Emmett and Finkelstein JJ placed less emphasis on directions of the making of the work, focusing on direction as to whether the work would be made at all. Given that, despite the form requirements of the contracts, Bean and the authors were also generally free to determine the substance of their volumes — an important facet of official war histories in Australia, reflected in the quotation at the start of Part II<sup>128</sup> — this argument is also difficult to establish.

This analysis, though, should not be limited to a consideration of the role of the Commonwealth in the *preparation* of the *Official History*, but also its role in the *publication* of the series. Under s 18 the Crown would also own copyright where a work was ‘published by or under the direction or control of His Majesty or any Government department’; section 1(3) defined the term ‘publication’ as ‘the issue of copies of the work to the public’.<sup>129</sup> While the Commonwealth may not have physically published the *Official History* — that action was undertaken in agreement with Angus & Robertson — there existed a clause in the author contracts expressly requiring the Commonwealth to organise and facilitate publication. If ‘direction’ is defined as ‘order or command, or management or control’, with ‘control’ defined as ‘the fact of controlling or of checking and directing action, the function or power of directing and regulating’, as Emmett J discussed, then the actions of the Commonwealth arguably satisfied these elements of s 18.

If this was the case, then copyright would have been owned by the Commonwealth under s 18 of the 1911 statute, by virtue of the act of publication, regardless of the existence of the author contracts. When the 1912 Act was repealed, s 177 of the 1968 *Copyright Act*, which provided and continues to provide for copyright ownership of works ‘first published by, or under the direction or control of, the Commonwealth or the State’, would have maintained this ownership. Copyright should have subsisted in each of the volumes for 50 years from first publication.

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<sup>127</sup> See generally ‘Australian Records of the War’ (n 53).

<sup>128</sup> ‘Official Histories’ (n 42).

<sup>129</sup> *Copyright Act 1911* (Imp) (n 7) s 1(3). See also Oldfield (n 105) 38–40.

**Table 2: Expiration of copyright in the volumes of *The Official History* under a 50-year term**

Volume	Year of First Publication	Date of entry into the public domain
I	1921	1 January 1972
II	1924	1 January 1975
III	1929	1 January 1980
IV	1933	1 January 1984
V	1937	1 January 1989
VI	1942	1 January 1993
VII	1923	1 January 1974
VIII	1923	1 January 1974
IX	1928	1 January 1979
X	1927	1 January 1978
XI	1936	1 January 1987

In the alternative, if it could be established that s 18 did not apply, then copyright would have subsisted in the volumes of the *Official History* pursuant to s 1(1), as before, but each of the volume authors would have been the first owner of the copyright by virtue of s 5(1). However, the contractual clauses would have amounted to a valid assignment of that copyright to the Commonwealth under s 5(2). The Commonwealth would be the subsequent owner of the copyright, with s 3 of the 1911 statute providing the applicable term of copyright: life of the author plus 50 years, subsequently extended to life of the author plus 70 years from 1 January 2005. Even if the *Official History* was considered a collective work,<sup>130</sup> copyright in each volume would still be determined on the basis of the life of the author, plus the applicable posthumous period of protection.<sup>131</sup> It appears that this is the approach taken by the AWM.

Table 3 therefore summarises the copyright status of each of the volumes of the *Official History* on the basis of this purported longer term of protection. It includes the volume details; author; author's year of death; the applicable term of copyright; and the suggested copyright status of the volume.

<sup>130</sup> *Copyright Act 1911* (Imp) (n 7) s 35(1). The term 'collective work' was defined in part to mean 'an encyclopædia, dictionary, year-book, or similar work' or 'any work written in distinct parts by different authors'. It is likely the *Official History* would satisfy that criteria.

<sup>131</sup> See Oldfield (n 105) 19: 'The term of protection of the contribution in the collective work will be the life of the author ... and for fifty years after his death.'

**Table 3: Copyright status of the volumes of the *Official History* under the general provisions**

Volume	Author	Year of Author's Death	Applicable duration of copyright	Suggested copyright status of volume
I-VI	Charles Bean	1968	Life of the author plus 70 years	In copyright; volume will enter the public domain on 1 January 2039
VII	Henry Gullett	1940	Life of the author plus 50 years	Copyright has expired; volume entered the public domain on 1 January 1991
VIII	Frederic Cutlack	1967	Life of the author plus 70 years	In copyright; volume will enter the public domain on 1 January 2038
IX	Arthur Jose	1934	Life of the author plus 50 years	Copyright has expired; volume entered the public domain on 1 January 1985
X	Seaforth Simpson MacKenzie	1955	Life of the author plus 70 years	In copyright; volume will enter the public domain on 1 January 2026
XI	Ernest Scott	1939	Life of the author plus 50 years	Copyright has expired; volume entered the public domain on 1 January 1990

A number of points are immediately apparent from this table.

While, as noted in Part I, the AWM claims that it ‘holds copyright for the text, maps and photographs contained in the Official Histories’, even on a broad interpretation of the applicable duration of protection for the series, three volumes — those penned by Jose (Volume IX), Gullett (Volume VII) and Scott (Volume XI) — have arguably entered the Australian public domain. That copyright also expired well before the term extension, with Volume IX entering in the public domain in 1985, Volume XI in 1990 and Volume VII in 1991. Coincidentally, Volume X of the series was one of the immediate beneficiaries of the 2004 term extension: instead of entering the public domain on 1 January 2006, copyright in MacKenzie’s volume will now expire at the end of 2026. Further, under these calculations, copyright will subsist the longest in the volumes penned by Bean (Volumes I to VI), expiring at the end of 2038, and Cutlack’s contribution (Volume VIII) will enter the public domain only very shortly beforehand, on 1 January 2038. Thus, while the majority of volumes of the *Official History* are still in copyright, it is not the case that the AWM can claim ownership in those that have already entered the public domain.

Three additional points, however, are worth noting. First, the calculations in Table 3 apply to the first published versions of the volumes, but multiple editions of the majority of the books of the *Official History* were published by Angus & Robertson. The last two editions were published in 1944. However, a ‘fresh’ copyright would not subsist with every subsequent edition, and it is not clear that the modifications made would have reached the level required under the law. Easton commented the following in 1915:

The general rule is, that each successive edition, which is substantially different from the preceding ones, or which contains new matter of substantial amount or value, becomes entitled to copyright as a new work, and it is immaterial whether the new edition is produced by condensing, expanding, correcting, re-writing, or otherwise altering the original work; or by introducing notes, citations, or other additions. Nor is it essential that the new edition should be an improvement on the old, the sole question is whether it is substantially different.<sup>132</sup>

Thus, a new copyright *may* have subsisted in one of the later editions, but a substantial comparative analysis of the text of the multiple volumes is beyond the boundaries of this article.

Second, in the 1980s the University of Queensland Press republished each of the volumes of the *Official History*, edited by Robert O'Neill. Each individual edition featured an introductory essay penned by noted historians including Ken Inglis, Ross Lamont and Bill Gammage. While copyright in each introduction would be owned by the author — a fact noted on the AWM website<sup>133</sup> — the inclusion of that new part would, as discussed above, not create a 'fresh' copyright in that edition of the relevant volume.

Third, it is also worth considering whether Official Historian and editor Charles Bean could be considered a joint author of each volume, and therefore copyright would subsist until 1 January 2039.<sup>134</sup> Under the *Copyright Act 1911* (Imp), 'a work of joint authorship' was defined as 'a work produced by the collaboration of two or more authors in which the contribution of one author is not distinct from the contribution of the other author or authors'.<sup>135</sup> A similar, though not identical, statement appears in the 1968 Act today.<sup>136</sup> However, from the historical record, it is apparent that, while Bean was fastidious in his role as Official Historian and editor of the series, and contributed occasional chapters to some of the volumes,<sup>137</sup> given his contributions would not have been truly 'in collaboration' with a volume's author, it is

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<sup>132</sup> JM Easton, *The Law of Copyright in Works of Literature, Art, Architecture, Photography, Music and the Drama: Including Chapters on Mechanical Contrivances and Cinematographs; Together with International and Foreign Copyright, With the Statutes Relating Thereto* (Stevens and Haynes, 5<sup>th</sup> ed, 1915) 61.

<sup>133</sup> See 'First World War Official Histories Copyright Statement' (n 34).

<sup>134</sup> The duration of copyright under the 1911 statute for works created by joint authorship was particularly complicated: see *Copyright Act 1911* (Imp) (n 7) s 16(1), (2); Oldfield (n 105) 80–3, 107–8. See also *Copyright Act 1968* (Cth) s 80 as amended by the *Copyright Amendment (Disability Access and Other Measures) Act 2017* (Cth) sch 2 item 5.

<sup>135</sup> *Copyright Act 1911* (Imp) (n 7) s 16(3).

<sup>136</sup> *Copyright Act 1968* (Cth) s 10(1) (definition of 'work of joint authorship').

<sup>137</sup> As Scott notes in the Preface to Volume XI, Bean wrote Chapter XIV of that volume, 'Australian Trade During the War'. See Ernest Scott, *The Official History of Australia in the War of 1914–1918 — Volume XI: Australia During the War* (Angus & Robertson, 1936) xiii.

unlikely he would have met the requirements of the statutory test for joint authorship.<sup>138</sup> As a result, if the 50-year period of protection does not apply, then the life of each of the individual volume authors, plus 50 or 70 years, would be the appropriate duration of protection.

As this Part has illustrated, Crown ownership of copyright has involved and continues to involve myriad provisions that are soon complicated in situations that do not automatically or holistically meet the requirements of the specific Crown copyright, or indeed general ownership, provisions. In other instances, the circumstances may meet all these requirements, raising questions as to which sections of Australian copyright law trump others. Part IV concludes this article with a reflection on the broader policy implications of government ownership today.

#### IV CONCLUSION

WWI ended on 11 November 1918. The first textual volume of the *Official History* was published in 1921; subsequent volumes were then released in 1923, 1924, 1927, 1928, 1929, 1933, 1936, 1937 and 1942. By the time the last volume was published, Australia had been involved in its second international conflict, WWII, for around three years.

Today, copyright has expired in three of the 11 textual volumes of the series. The next volume will enter the public domain in 2026 and copyright in the final seven volumes will expire at the end of 2037 and 2038 respectively. In the case of Bean's six volumes, copyright will have subsisted in these works between 96 years (Volume VI) and 117 years (Volume I). When these volumes enter the public domain, Australia will also commemorate the 120<sup>th</sup> anniversary of the cessation of WWI.

The lengthy durations of copyright in the *Official History* are not the result of any specific Crown copyright provisions contained in the 1911 or 1968 statute. Indeed, if Bean and the various authors, or Angus & Robertson, had been the owner of the copyright, rather than the Commonwealth, then protection for life of the author plus 50 or 70 years would still have applied. Still, it is troubling that books paid for by Australian public funds — where the content is in many parts about a conflict involving a substantial loss of Australian lives — will not all be available for public reproduction and consumption until 120 years after the end of those hostilities. While the AWM makes these works freely available on its website, and notes permission is only required in a commercial context,<sup>139</sup> if the AWM disagreed with the way in which a publisher sought to use the series, then copyright could still be invoked, at least in the case of eight of the volumes. As long as copyright continues, so does this risk.

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<sup>138</sup> See also Oldfield (n 105) 108; Easton (n 132) pt III ch II.

<sup>139</sup> See 'First World War Official Histories Copyright Statement' (n 34).

In recent years the Australian Parliament has indicated its willingness to make amendments to the duration of copyright, as evidenced by changes in the *Copyright Amendment (Disability Access and Other Measures) Act 2017* (Cth).<sup>140</sup> This included capping the duration of Crown copyright under s 180 to ‘50 years after the calendar year in which the material is made’,<sup>141</sup> as opposed to the previous position where a fixed term of copyright was only triggered upon publication.<sup>142</sup> Parliament could rectify the circumstances identified in this article with a simple change to the *Copyright Act 1968* (Cth), through an amendment or new section providing that, regardless of how copyright came to subsist in a work, or how the Crown gained ownership of that material, where the Commonwealth, or a State or Territory government, is the ultimate owner, the relevant duration of protection is ‘50 years after the calendar year in which the material is made’.<sup>143</sup> While there may be some logistical issues with such a change, given the complexity that arises in even simple situations involving Crown ownership of copyright, the clarity and public good resulting from such an amendment outweigh any challenges.

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<sup>140</sup> See *Copyright Amendment (Disability Access and Other Measures) Act 2017* sch 2.

<sup>141</sup> See discussion above (n 1).

<sup>142</sup> See *Copyright Act 1968* (Cth) s 180(1) as first enacted.

<sup>143</sup> See also Recommendations 2 and 3 in CLRC (n 1) xxii–xxiv, though these recommendations must be read in the context of the suggested repeal of ss 176–9: at xxii, Recommendation 1. The proposal here also raises issues for the prerogative right of the Crown in the nature of copyright, which could be rectified through the abolition of that right, as also recommended by the CLRC: at xxviii, Recommendation 7.



## AN ARGUMENT FOR ABOLISHING DELAY AS A MITIGATING FACTOR IN SENTENCING

### ABSTRACT

Delay is a common mitigating factor in sentencing and can sometimes result in a significant penalty reduction. This is despite the fact that delay does not impact on the seriousness of the offence or the culpability of the offender. This article examines the validity of the rationales which underpin reducing sentencing severity on the basis of delay. It emerges that there is a dearth of critical analysis on this issue. This article attempts to at least partially fill a gap in the literature. There are two different rationales which have been advanced to justify delay reducing penalty severity. The first is anxiety stemming from the waiting associated with a criminal matter being finalised. The second is rehabilitation that the offender may have undergone prior to sentencing. An examination of these rationales establishes that: (i) the anxiety rationale is based on speculative assumptions and reasoning and (ii) the rehabilitation limb cannot justify delay as a sentencing factor given that rehabilitation is a stand-alone, independent, mitigating factor. Hence, it is argued that (subject to one relatively uncommon exception) delay should be abolished as a mitigating factor. This would enhance the transparency and integrity of the sentencing system without undermining any of its appropriate objectives.

### I INTRODUCTION

Delay is a well-established mitigating factor in sentencing in Australia.<sup>1</sup> Courts often invoke it as a basis for reducing the severity of the sanction that is imposed on offenders, and in some instances it is a powerful mitigating consideration.<sup>2</sup> Despite this, the circumstances in which it is applied by courts are

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\* Professor, Swinburne Law School; BA, LLB (Hons), PhD (Monash). I thank the anonymous reviewers whose detailed and insightful comments considerably improved the structure and content of the article.

<sup>1</sup> Kate Warner et al, 'Sentencing Discounts for Delay' (2018) 42(1) *Criminal Law Journal* 22.

<sup>2</sup> Ibid 25–6. See also *Sabra v The Queen* (2015) 257 A Crim R 33, 43–4 [33] ('*Sabra*'); *R v Schwabegger* [1998] 4 VR 649, 659 ('*Schwabegger*'); *R v Gay* (2002) 49 ATR 78, 82 [18]; *R v EGC* [2005] NSWCCA 392; *R v Kay* [2004] NSWCCA 130.

unclear and the doctrinal underpinnings of delay as a mitigating factor have not been the subject of extensive judicial or scholarly analysis.<sup>3</sup>

Despite the frequency with which delay is invoked by sentencing courts, it has been noted that there is ‘little in the way of critical evaluation of the theoretical foundations for this particular factor to determine whether [it has] ... a respectable rationale for acceptance as a relevant sentencing factor’.<sup>4</sup> This article attempts to at least partially fill this gap in the literature by examining the jurisprudential underpinning for delay in the sentencing calculus.

Delay mitigates sentencing severity in two circumstances. First, when the offender during the period of the delay demonstrates progress towards rehabilitation. This is termed the ‘rehabilitation limb’ of delay. More fully, this limb applies not only when offenders have taken rehabilitative steps, but also when they display remorse. In keeping with orthodox terminology, unless expressly indicated to the contrary in this article, the rehabilitation limb also refers to situations when the offender exhibits remorse. The second main situation when delay reduces sanction severity is when the delay causes the offender anxiety or hardship. This is referred to as the ‘fairness limb’.

In relation to both rationales underpinning delay, a notable feature of the existing law is that the circumstances in which delay can be enlivened are strikingly lacking in specificity. There is not even an approximate indication regarding the length of time that needs to pass before delay can mitigate penalty. Thus, the scope of this mitigating factor is vague. This could potentially be addressed by establishing guidelines regarding the acceptable temporal limits associated with finalising criminal matters. However, even if this shortcoming could be addressed it is recommended that delay should in nearly all circumstances be abolished as a sentencing consideration. This is because the rationales underpinning the operation of delay are flawed.

The fairness limb of delay is unsound because it is based on the untested and speculative assumption that offenders are disadvantaged by prolonging the period between the commission of the crime (or being charged with the crime) and being sentenced. It is no less plausible to assert that offenders benefit from delaying their sentencing because it allows them to better plan and arrange their family, financial and other business or work-related matters. The only tenable grounds for reducing sanctions on account of delay are where the offender demonstrates remorse or progress towards rehabilitation, but these are discrete, stand-alone sentencing considerations already and it is futile to ground them in the context of delay.

Effectively abolishing delay as a sentencing factor would make the law more coherent, transparent and consistent without undermining any important sentencing objectives. The focus on the appropriate role of delay in the sentencing calculus and the recommendations in this article are especially timely given that in the foreseeable

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<sup>3</sup> Warner et al (n 1) 23 lists some of the circumstances in which delay can be mitigatory.

<sup>4</sup> Ibid 30.

future many more old criminal cases are likely to come before the courts as a result of the ‘continuing stream of historical sexual abuse cases, prompted by the publicity given to the Royal Commission into historical sexual abuse’.<sup>5</sup>

In the next part of the article, I examine the current legal position in relation to delay. This is followed, in Part III, by a discussion and critique of the doctrinal underpinnings of this ground of mitigation. Reform recommendations are made in the concluding remarks.

## II THE LEGAL POSITION ON DELAY IN SENTENCING

### *A Overview of the Sentencing Landscape*

Prior to examining the role of delay in sentencing, I provide a brief overview of the sentencing legal landscape. Sentencing law in Australia is a combination of statutory and common law. Although each jurisdiction has its own statutory scheme, the broad considerations that determine sentencing outcomes are similar throughout the country. The key sentencing objectives are set out in the main sentencing statutes in each jurisdiction. They consist of community protection (which is most commonly pursued by incarceration), rehabilitation, retribution, specific deterrence, general deterrence and denunciation.<sup>6</sup> The nature and severity of the punishment that is imposed by the courts is chiefly determined by the principle of proportionality, which at common law sets the upper limit for the severity of the sanction that is imposed.<sup>7</sup>

In arriving at a sentence, the courts are also required to take into account a large number of aggravating factors (which increase penalty) and mitigating factors (which operate to reduce penalty severity). The source of aggravating and mitigating considerations varies considerably throughout Australia. The sentencing legislative

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<sup>5</sup> Warner et al (n 1) 33.

<sup>6</sup> *Crimes (Sentencing) Act 2005* (ACT) s 7(1); *Crimes Act 1914* (Cth) ss 16A(1)–(2); *Crimes (Sentencing Procedure) Act 1999* (NSW) s 3A; *Sentencing Act 1995* (NT) s 5(1); *Penalties and Sentences Act 1992* (Qld) s 9(1); *Sentencing Act 2017* (SA) ss 3–4, 9; *Sentencing Act 1997* (Tas) s 3; *Sentencing Act 1991* (Vic) s 5(1); *Sentencing Act 1995* (WA) ss 3, 6.

<sup>7</sup> In *Hoare v The Queen* (1989) 167 CLR 348, the High Court unanimously stated that ‘a basic principle of sentencing law is that a sentence of imprisonment imposed by a court should never exceed that which can be justified as appropriate or proportionate to the gravity of the crime considered in light of its *objective* circumstances’: at 354. In *Veen v The Queen* (1979) 143 CLR 458, 467 and *Veen v The Queen (No 2)* (1988) 164 CLR 465, 472, the High Court stated that proportionality is the primary aim of sentencing. Proportionality has also been given statutory recognition in all Australian jurisdictions except Tasmania: *Crimes (Sentencing) Act 2005* (ACT) s 7(1)(a); *Crimes Act 1914* (Cth) s 16A(2)(k); *Crimes (Sentencing Procedure) Act 1999* (NSW) s 3A(a); *Sentencing Act* (NT) s 5(1)(a); *Penalties and Sentences Act 1992* (Qld) s 9(1)(a); *Sentencing Act 2017* (SA) ss 3, 4, 10; *Sentencing Act 1991* (Vic) ss 5(1)(a); *Sentencing Act 1995* (WA) s 6(1).

schemes in two jurisdictions (the *Crimes (Sentencing Procedure) Act 1999* (NSW)<sup>8</sup> and the *Penalties and Sentences Act 1992* (Qld))<sup>9</sup> each set out more than 30 aggravating and mitigating considerations, whereas the sentencing statutes in the other jurisdictions only identify a small number of such factors. Despite this, there remains a considerable convergence regarding the mitigating and aggravating factors that operate throughout Australia because most of these considerations stem from the common law.<sup>10</sup> There are in fact more than 200 mitigating and aggravating factors in sentencing law.<sup>11</sup> Delay is one such mitigating consideration. Although it is frequently invoked by sentencing courts, it does not have a statutory basis in any Australian jurisdiction and instead is grounded in the common law.<sup>12</sup> To give some examples of other sentencing considerations, important aggravating factors<sup>13</sup> are: prior criminal record;<sup>14</sup> high vulnerability or innocence of victim;<sup>15</sup> offences committed while on bail or parole;<sup>16</sup> breach of trust and monetary motive for the crime.<sup>17</sup>

The reasoning process by which sentencing decisions are made is known as the ‘instinctive synthesis’.<sup>18</sup> This requires judges to identify all of the factors that are applicable to a particular sentence, and then set a precise penalty.<sup>19</sup> However, courts are not permitted to set out with particularity the precise weight that has been

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<sup>8</sup> See *Crimes (Sentencing Procedure) Act 1999* (NSW) ss 21A, 24.

<sup>9</sup> *Penalties and Sentences Act 1992* (Qld) pt 2.

<sup>10</sup> See *Bui v DPP (Cth)* (2012) 244 CLR 638 with particular reference to the federal sentencing regime.

<sup>11</sup> Joanna Shapland, *Between Conviction and Sentence: The Process of Mitigation* (Routledge & Kegan Paul, 1981) 55, identifies 229 different mitigating factors. For an overview of the operation of mitigating and aggravating factors, see Geraldine Mackenzie and Nigel Stobbs, *Principles of Sentencing* (Federation Press, 2010) ch 4; Stephen J Odgers, *Sentence* (3<sup>rd</sup> ed, 2015) ch 4.

<sup>12</sup> See Warner et al (n 1).

<sup>13</sup> Examples of important mitigating factors are provided in Part III, Section C of this article.

<sup>14</sup> *Field v The Queen* [2011] NSWCCA 70; *Saunders v The Queen* [2010] VSCA 93.

<sup>15</sup> *R v Tran* (2002) 4 VR 457; *DPP v Grabovac* [1998] 1 VR 664; *R v Eisenach* [2011] ACTCA 2; *Royer v Western Australia* (2009) 197 A Crim R 319; *R v El-Chammas* [2009] NSWCCA 154.

<sup>16</sup> *R v Gray* [1977] VR 225; *R v Basso* (1999) 108 A Crim R 392; *R v AD* (2008) 191 A Crim R 409.

<sup>17</sup> *DPP (Vic) v Truong* [2004] VSCA 172; *Carreras v The Queen* (1992) 60 A Crim R 402; *A-G (Tas) v Saunders* [2000] TASSC 22; *Hill v The Queen* [1999] TASSC 29; *R v Ottobriano* [1999] WASCA 207; *R v Black* [2002] WASCA 26.

<sup>18</sup> See *R v Williscroft* [1975] VR 292, 300; *Barbaro v The Queen* (2014) 253 CLR 58 (‘*Barbaro*’). See also Wayne Martin, ‘The Art of Sentencing — An Appellate Court Perspective’ (Conference Paper, Singapore Academy of Law & State Courts of Singapore Sentencing Conference, 9 October 2014) 6–9.

<sup>19</sup> *Markarian v The Queen* (2005) 228 CLR 357 (‘*Markarian*’); *Wong v The Queen* (2001) 207 CLR 584; *Barbaro* (n 18).

conferred on any individual sentencing factor.<sup>20</sup> The alternative approach to the instinctive synthesis is termed the two-tier or two-step approach.<sup>21</sup> It involves a court setting an appropriate sentence commensurate with the severity of the offence and then making allowances up and down, in light of relevant aggravating and mitigating circumstances.<sup>22</sup> The two-step approach was firmly rejected by the High Court in *Markarian v The Queen*:

Following the decision of this Court in *Wong* it cannot now be doubted that sentencing courts may not add and subtract item by item from some apparently subliminally derived figure, passages of time in order to fix the time which an offender must serve in prison.<sup>23</sup>

Thus, when sentencing courts state that they take a mitigating or aggravating factor into account it is not possible to quantify to what extent that factor actually influences their decision. Despite this, as noted below, courts often state that delay is an important mitigating consideration and hence, reforms relating to delay have the capacity to meaningfully influence sentencing outcomes. I now consider in greater detail the current role that delay has in the sentencing calculus.

#### B *Overview of Causes of Delay and Recognition of Delay as a Mitigating Factor*

It is well-established that delay can result in a sentence reduction, sometimes resulting in a considerable degree of leniency. The seminal statement regarding the operation and importance of delay is by Street CJ in *R v Todd* ('*Todd*')

where there has been a lengthy postponement, whether due to an interstate sentence or otherwise, fairness to the prisoner requires weight to be given to the progress of his rehabilitation during the term of his earlier sentence, to the circumstance that he has been left in a state of uncertain suspense as to what will happen to him when in due course he comes up for sentence on the subsequent occasion,

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<sup>20</sup> *Pesa v The Queen* [2012] VSCA 109, [10]. The only exceptions are discounts which are accorded for pleading guilty and cooperating with authorities: see Mackenzie and Stobbs (n 11).

<sup>21</sup> This received support from Kirby J in *Markarian* (n 19).

<sup>22</sup> The contrasts are also set out by McHugh J in *Markarian* (n 19): 'By two-tier sentencing, I mean the method of sentencing by which a judge first determines a sentence by reference to the "objective circumstances" of the case. This is the first tier of the process. The judge then increases or reduces this hypothetical sentence incrementally or decrementally by reference to other factors, usually, but not always, personal to the accused. This is the second tier. By instinctive synthesis, I mean the method of sentencing by which the judge identifies all the factors that are relevant to the sentence, discusses their significance and then makes a value judgment as to what is the appropriate sentence given all the factors of the case. Only at the end of the process does the judge determine the sentence': at 377–8 [51].

<sup>23</sup> (2005) 228 CLR 357, 375 [39]. The competing approaches were most recently considered by the High Court in *Barbaro* (n 18), where the plurality confirmed the instinctive synthesis approach: at 72 [34].

and to the fact that sentencing for a stale crime, long after the committing of the offences, calls for a considerable measure of understanding and flexibility of approach — passage of time between offence and sentence, when lengthy, will often lead to considerations of fairness to the prisoner in his present situation playing a dominant role in the determination of what should be done in the matter of sentence; at times this can require what might otherwise be a quite undue degree of leniency being extended to the prisoner.<sup>24</sup>

The relevance of delay to sentencing has not been considered at length by the High Court. However, in *Mill v The Queen*, Wilson, Deane, Dawson, Toohey and Gaudron JJ cited *Todd* with approval and stated:

The long deferment of the trial or punishment of an offender [in this case brought about by the fact that the offender was being dealt with for offences committed in different states], with the consequent uncertainty as to what will happen to him, raise considerations of fairness to an offender which must be taken into consideration when the second court is determining an appropriate head sentence.<sup>25</sup>

As alluded to in the above passage, there is often a significant time lapse between when an offender commits an offence and when they are sentenced. There are myriad reasons that can cause or contribute to the delay. Often the reason relates to the circumstances in which the offence is committed, for example, when the victim does not report the crime until well after it has occurred or when police do not identify or apprehend the offender until a long time after the offence. In many cases delay is caused by the positive acts of the offender, such as where the offender conceals the offence, absconds or actively drags out the court process, for example, by pleading not guilty in circumstances where there is not a tenable defence.

Another common cause of delay relates to institutional reasons stemming from the operation and functioning of the legal system.<sup>26</sup> Court backlogs invariably result in a significant time lapse between when an accused is charged and sentenced. The latest data from the Productivity Commission show that while finalisation times for courts vary considerably throughout the country, there is often a long processing time for criminal matters.<sup>27</sup> In the Supreme Courts of the two largest jurisdictions,

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<sup>24</sup> [1982] 2 NSWLR 517, 519–20 (*Todd*). See also *R v Merrett* (2007) 14 VR 392, 399–401 (*Merrett*); *R v Law; Ex parte A-G (Qld)* [1996] 2 Qd R 63, 66 (*Law*); *R v SP* (2004) 149 A Crim R 48, 56–7 [31]–[35]. For a more recent summary of the authorities, see *Ridgeway v The Queen* [2016] NSWCCA 184; *DPP (Cth) v Pratten (No 2)* (2017) 94 NSWLR 194. For a summary of the principles relating to delay in the federal sphere, see Commonwealth Director of Public Prosecutions, *Sentencing of Federal Offenders in Australia: A Guide for Practitioners* (1<sup>st</sup> ed, 2018) 54–7.

<sup>25</sup> (1988) 166 CLR 59, 66 (*Mill*). See also *R v Gardner* [2015] QCA 70.

<sup>26</sup> This is especially the case where an offender is sentenced for offences in more than one jurisdiction: see, eg, *Mill* (n 25).

<sup>27</sup> Productivity Commission, *Report on Government Services* (Report, January 2018) pt C ch 7.

New South Wales and Victoria, 11.2% and 7.3% respectively of non-appeal criminal matters are not finalised within 24 months of commencement.<sup>28</sup> Even in relation to what are typically regarded as less serious and more straightforward matters, it is not uncommon for more than 12 months to pass before matters are finalised. Thus, we see that in Victoria, Queensland, Western Australia, Tasmania, the Australian Capital Territory and the Northern Territory the number of criminal cases which are not finalised within 12 months from the date of commencement is 10% or more.<sup>29</sup>

It is not surprising then that delay is a commonly invoked sentencing consideration. A study by the Victorian Sentencing Advisory Council which examined sentencing appeals in Victoria in the calendar years of 2008 and 2010 noted that delay was a frequently invoked ground of appeal.<sup>30</sup> In 2008, it was the equal eighth most common ground of appeal raised by offenders (equating to 10.5% of all appeals), while in 2010 it dropped to number 12 (equating to 9.1% of all offender appeals).<sup>31</sup>

A more recent study of sentencing considerations, this time focusing on jurors' view of 140 sentencing decisions imposed in the Victorian County Court during the period 2013–14, noted that delay was a mitigating factor in 64 of the cases.<sup>32</sup> It was therefore the third most common mitigating factor (after rehabilitation and good character).<sup>33</sup> While it is not possible to ascertain exactly how much emphasis was attributed to delay,<sup>34</sup> the sentencing remarks indicated that in 16% of instances when delay was relevant it was given a 'lot of weight',<sup>35</sup> while it was accorded little or no weight in 21% of cases and some weight in the remaining 63% of cases.<sup>36</sup>

I now examine the rationales which underpin delay as a mitigating factor.

### C *Rationales for Delay: Fairness and Rehabilitation*

While the range of situations that can result in or contribute to delay is considerable, the courts have placed some, albeit loose, limits on the circumstances in which delay can operate to reduce penalty. The parameters of when delay can mitigate penalty

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<sup>28</sup> Ibid attachment table 7A.19.

<sup>29</sup> Ibid.

<sup>30</sup> Sentencing Advisory Council, *Sentence Appeals in Victoria: Statistical Research Report* (Report, March 2012).

<sup>31</sup> Ibid 139, 142–3 (in 2010 the grounds of 'failure to take into account delay' and 'weight to delay' are listed separately but have been grouped together to reach this figure). The rate at which the ground succeeded was 25% in 2008 and 14% in 2010.

<sup>32</sup> Warner et al (n 1) 25.

<sup>33</sup> Ibid.

<sup>34</sup> This is due to the instinctive synthesis approach to sentencing, which is discussed further in Part II of this article.

<sup>35</sup> Warner et al (n 1) 26.

<sup>36</sup> Ibid.

logically derive from the rationales underpinning this consideration. A relatively recent discussion of the rationales for delay is set out in *Tones v The Queen* ('*Tones*').<sup>37</sup>

In *Tones*, the Victorian Court of Appeal confirmed the position in *Todd* that delay can reduce penalty as a matter of fairness to the accused because a long wait for finalisation of a criminal matter can cause an offender stress and anxiety. This is known as the fairness limb of delay. The basis for the fairness limb has been described in numerous ways, but the overarching justification is that it is assumed an accused experiences anxiety, stress and more generally inconvenience from delay.<sup>38</sup> The nature of the inconvenience has been articulated in several ways, including that it is unfair for an accused to have a matter 'hanging over his head'<sup>39</sup> for a considerable period, it is unfair to keep the offender in a 'state of suspense'<sup>40</sup> or that as a result of the delay an offender might spend 'years in emotional hell ... terrified that the day may come when he is found out'.<sup>41</sup>

In *Tones*, the Court also noted that there is another well-established basis upon which delay can mitigate penalty. This is termed the rehabilitation limb. The Court confirmed the existence of the fairness and rehabilitation limbs and the fact that delay can be a strong mitigating factor in the following passage:

It is well established that significant delay between the time that an offender is interviewed by police and the time that charges are laid, and delay between the laying of charges and trial, can be a powerful mitigating factor. There are two

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<sup>37</sup> [2017] VSCA 118.

<sup>38</sup> In some instances, courts have expressed some doubt over the fairness limb. Thus, in *R v Pickard* [2011] SASCFC 134, Blue J stated: 'mere unnecessary delay, without being coupled with relevant changes occurring during the delay, is not usually a reason in itself to reduce or suspend a sentence if otherwise indicated (although this will obviously depend on the length of the delay and the particular circumstances)': at [97]. But this proposition has been subsequently criticised: *Sabra* (n 2) 45–6 [40].

<sup>39</sup> *Merrett* (n 24) 400 [35] quoting *Duncan v The Queen* (1983) 47 ALR 746, 749 ('*Duncan*'). In this case, the offences were committed in June 2001, charges were laid in April 2004 and the applicants were sentenced in June 2006. More fully, Maxwell P stated at [34]–[35]: 'On a proper analysis ... the significance of delay as a sentencing factor cannot depend on whether or not there is a satisfactory explanation for the delay. There is, of course, a strong public interest in criminal conduct being investigated and prosecuted as quickly as is reasonably practicable. But the absence of an explanation for the delay could not, by itself, justify any greater reduction in the sentence than would be made in a case where the delay was satisfactorily explained. The relevance of delay lies rather in the effect which the lapse of time — however caused — has on the accused. Delay constitutes "a powerful mitigating factor". In particular, it focuses attention on issues of rehabilitation and fairness'. His Honour then quoted *Duncan*: 'The very fact of the long delay in bringing the matter to court which led the applicant to have this matter hanging over his head for nearly four years is rightly prayed in aid on his behalf': at 749. See also *R v Nikodjevic* [2004] VSCA 222 ('*Nikodjevic*').

<sup>40</sup> *R v Blanco* (1999) 106 A Crim R 303, 306 [16]–[17] ('*Blanco*'); *Todd* (n 24) 519.

<sup>41</sup> *Holyoak v The Queen* (1995) 82 A Crim R 502, 508 ('*Holyoak*').

limbs to delay. The first limb concerns unfairness to the offender, in the sense that the relevant charge — or the prospect of such a charge — was ‘hanging over’ the accused’s head and caused him or her anxiety (‘unfairness limb’). The second limb concerns whether, during the period of the delay, the offender made progress towards rehabilitation and whether there were good prospects of ongoing rehabilitation (‘rehabilitation limb’).<sup>42</sup>

The second (rehabilitation) limb is in fact divided into two separate but often interrelated categories. The first is when the offender demonstrates steps towards rehabilitation. The other is when the offender displays remorse. Thus, it has been stated that

[t]here are two aspects to the rehabilitation limb. The first is whether the offender has accepted responsibility for the offending, acknowledged its wrongfulness and expressed remorse. The second is whether the offender has taken steps to reform, including by seeking counselling or other appropriate professional assistance, refraining from committing any further offences and being a valuable member of the community. For example, in *R v Merrett, Piggott and Ferrari*, this Court held that one of the offenders in that case had made ‘a number of significant changes in his life’.<sup>43</sup>

While the second delay limb is logically comprised of two situations, courts typically refer to both of these situations as the rehabilitation limb.

#### D *Particular Circumstances in Which Delay Can Mitigate Penalty*

The application of the rationales underpinning delay has resulted in the courts prescribing a number of concrete situations when delay can mitigate penalty.<sup>44</sup>

The fairness limb of delay can be invoked in relation to delay at all stages of the criminal justice system. In particular, it is relevant ‘where there is delay between the date of apprehension of the offender, or first indication to him by some person in authority that he is likely to be prosecuted, and the date of the sentence’<sup>45</sup> or where there is tardiness in the manner in which the matter is dealt with by prosecution officials<sup>46</sup> and the court system.<sup>47</sup> Thus, most of the common scenarios in which a

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<sup>42</sup> *Tones v The Queen* [2017] VSCA 118, [36] (‘*Tones*’).

<sup>43</sup> *Ibid* [41].

<sup>44</sup> Arie Freiberg, *Fox and Freiberg’s Sentencing: State and Federal Law in Victoria* (Thomson Reuters, 3<sup>rd</sup> ed, 2014) 429–33; Mirko Bagaric and Richard Edney, *Sentencing in Australia* (Thomson Reuters, 2<sup>nd</sup> ed, 2015) 383–8; Odgers (n 11) 371–6; *Merrett* (n 24) 400 [34]–[36]; *DPP (Vic) v WRJ* [2009] VSCA 174, [14]–[20]; *Tones* (n 42) [36]–[43].

<sup>45</sup> *Law* (n 24) 66. See also *Thorn v Western Australia* [2008] WASCA 36, [37].

<sup>46</sup> See, eg, *R v Palmer* [2000] VSCA 236; *Nikodjevic* (n 39).

<sup>47</sup> *Khoury v The Queen* (2011) 209 A Crim R 509.

delay occurs in the context of finalising criminal charges can enliven the fairness limb.

However, there are a number of situations where the courts have expressly stated that the fairness limb of delay will be accorded less weight. Most of these scenarios relate to circumstances where the offender was the cause of the delay or could have readily expedited the matter being brought to finality. Thus, less weight is generally given to delay if the time lag is between the commission of the offence and the charging of the accused<sup>48</sup> and in some cases it has been stated that in such circumstances no discount is accorded.<sup>49</sup> This is because in these situations the offender could have readily expedited the matter by coming forward to police<sup>50</sup> and in relation to certain offences, especially sexual offences against children, it is foreseeable that there would be a delay in reporting the offences.<sup>51</sup> It is thus not surprising that the circumstance in which the fairness limb is least applicable is when the delay is caused by the absconding of the offender.<sup>52</sup> In this context, however, it does not necessarily follow that no weight will be accorded to delay because ‘it is appropriate for a sentencing judge to give attention to the fact that a person living as a fugitive will always be fearful of apprehension’.<sup>53</sup> Following an analysis of the case law, Stephen Odgers QC concludes that it is ‘problematic’ to determine the relevance of delay prior to arrest.<sup>54</sup> He notes that ‘the weight of authority is that such delay will not, in general, be taken into account as a mitigating factor. However, there are judicial observations that there may be cases where a long delay between offence and arrest may be relevant to sentence ... Perhaps it is a matter of degree’.<sup>55</sup>

Further, where there is a delay because of the complexity of the matter, either at the investigative or trial phase,<sup>56</sup> less discount is normally accorded.<sup>57</sup> Similarly, less emphasis is normally accorded to delay when the offender drags out the finalisation of

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<sup>48</sup> However, it is not the case that normally no weight is given to delay in these circumstances: see, eg, *Dragojlovic v The Queen* (2013) 40 VR 71; *CD v The Queen* [2013] VSCA 95.

<sup>49</sup> *Law* (n 24) 66–7 (delay of 15 years in making a complaint not mitigating); *Holyoak* (n 41) 508–9. See also *Nikodjevic* (n 39).

<sup>50</sup> See *Bell v The Queen* [2001] WASCA 40 (‘*Bell*’) as cited in *Freiberg* (n 44) 431.

<sup>51</sup> See *Bell* (n 50); *R v Glennon* [1993] 1 VR 97; *R v Liddy (No 2)* (2002) 84 SASR 231, 285 [185]–[187]. But this is not a settled rule: see *Holyoak* (n 41).

<sup>52</sup> *Scook v The Queen* (2008) 185 A Crim R 164 (‘*Scook*’); *Gok v The Queen* [2010] WASCA 185; *Walker v The Queen* [2016] NSWCCA 213.

<sup>53</sup> *R v Reeves* [2002] NSWCCA 33, [13].

<sup>54</sup> Odgers (n 11) 375.

<sup>55</sup> *Ibid.*

<sup>56</sup> It is sometimes stated that where the prosecution has been tardy in prosecuting a matter that it would then be inconsistent for it to contend that the offence is serious and hence the prosecution is bound to accept that the delay should mitigate: *Scook* (n 52); *Giourtalis v The Queen* [2013] NSWCCA 216 (‘*Giourtalis*’).

<sup>57</sup> *Giourtalis* (n 56) [1789]–[1792].

a matter due to the manner in which they conduct the plea negotiations.<sup>58</sup> However, it is relatively settled that when the delay is caused by the offender contesting criminal charges this does not diminish the significance of delay in sentencing, given the right of the accused to plead not guilty.<sup>59</sup> In *Scook v The Queen* it was noted that

delay will not ordinarily be a mitigating factor if it is caused by the offender's obstruction or lack of co-operation with the State, prosecuting authorities or investigatory bodies, but the offender's reliance on his or her legal rights is not obstruction or lack of co-operation for this purpose.<sup>60</sup>

The courts have been more liberal in applying the rehabilitation limb of delay, at least from the perspective that in this context the reasons for the delay are less relevant. Thus, even when the cause of the delay is that the offender has absconded this limb can still apply.<sup>61</sup> However, in some instances the courts have opted for a stricter approach to the application of the rehabilitation limb where the delay is caused by the accused.<sup>62</sup> In *R v Whyte*, Winneke P noted:

Where, however, the delay cannot be sheeted home to the prosecution or the system, but can be fairly attributed to the accused, such as absconding from bail, fleeing the jurisdiction or otherwise avoiding being brought to justice, delay must necessarily become of less significance, even to the point of giving less credit for rehabilitation established during that period.<sup>63</sup>

Thus, we see that even in relation to the rehabilitation limb when the offender is responsible for the delay, sometimes less weight is accorded to this consideration.

### E *Matters of Proof*

The extent to which the factors relating to delay need to be demonstrated before this ground can be enlivened to reduce penalty is to a large degree dependent on the limb which is being invoked. From the evidential perspective, the fairness limb is the easiest to satisfy and typically is applied on the mere setting out of the extent of the delay. This is because courts often readily assume that offenders experience anxiety as a result of waiting for a considerable period to learn their fate in relation to criminal matters. Occasionally, the courts have adverted to the desirability of producing 'some evidence',<sup>64</sup> for example a psychological report, in support of the hardship caused by delay, but typically no evidence is provided and courts generally

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<sup>58</sup> *R v Ververis* [2010] VSCA 7, [14].

<sup>59</sup> *Arthars v The Queen* (2013) 39 VR 613, 621 [27].

<sup>60</sup> (2008) 185 A Crim R 164, 176 [60].

<sup>61</sup> *Marshall v The Queen* [2011] VSCA 130.

<sup>62</sup> *R v Thompson* (1987) 37 A Crim R 97, 100 ('*Thompson*'); *R v Berry* (2007) 17 VR 153, 189 [124]–[125].

<sup>63</sup> (2004) 7 VR 397, 404 [25] ('*Whyte*').

<sup>64</sup> *Tones* (n 42) [38].

accept assertions from the bar table that the delay has caused hardship.<sup>65</sup> This is illustrated by the observation of Holmes JA (with whom Gotterson JA and Philippides J agreed) in *R v Cox*: ‘[n]or is it imperative, in my view, that there be direct evidence that delay has had an impact through the protracted anxiety of the threat of prosecution; in a sufficiently obvious case an inference to that effect may be drawn’.<sup>66</sup>

The courts are generally more probing in relation to the rehabilitation limb. There are a number of evidential requirements that courts generally apply in order for mitigation to be accorded for rehabilitation or remorse.<sup>67</sup> However, in circumstances where delay has occurred and an offender seeks to invoke the rehabilitation limb, the courts have nevertheless displayed a willingness to accord some mitigation merely on the basis that the offender has not committed other offences since the offence(s) for which they are being sentenced. In *Tones* the Court stated:

Both aspects of rehabilitation — remorse and reformation — must be demonstrated, in order for the court to give full weight to that limb. Less than full weight will be accorded where reliance is placed merely on abstinence from further offending. ... In the present case ... [c]ounsel on the plea stated that reliance was placed on rehabilitation but did not identify the basis upon which it should be inferred. It was certainly relevant to ‘reformation’ during the period of delay that the appellant had not committed any offences since the offending for which he was to be sentenced. But, as counsel for the appellant conceded, he was not able to submit that the appellant accepted responsibility for his wrongdoing or was remorseful. Further, counsel did not suggest that the appellant had taken any steps towards rehabilitation during the period of the delay.<sup>68</sup>

Thus, generally the courts will accord some weight to delay in relation to both limbs even in the absence of proof of anxiety or steps towards rehabilitation.

#### F *How Long Is Too Long: What Is Delay?*

One aspect for which there is surprisingly little guidance on the role of delay in sentencing is the threshold issue of what time period qualifies as a delay. There are not even vague guideposts in relation to this matter. In *R v Idolo*, the Court stated that ‘what is undue delay deserving of mitigation of punishment is essentially a matter of degree to which common sense is to be applied’.<sup>69</sup> Further, it was noted in *R v Miceli*<sup>70</sup> that in order for delay to reduce penalty the delay need not be inordinate in length.

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<sup>65</sup> Ibid.

<sup>66</sup> (2013) 92 ATR 80, 105 [102].

<sup>67</sup> See further Part III below.

<sup>68</sup> *Tones* (n 42) [42]–[44].

<sup>69</sup> [1998] VSC 276, [25].

<sup>70</sup> [1998] 4 VR 588, 591.

Some guidance regarding the duration of time that needs to pass before delay can be invoked can potentially be discerned by examining individual cases where the relevant length has been specified. This approach does not, however, facilitate the establishment of even crude guidelines on this issue. In *Nguyen v The Queen*,<sup>71</sup> drug offences were committed between August 2012 and March 2013. The offender was charged in late March 2013. The committal commenced in November 2013 and spanned over five days, finishing in January 2014. The plea was in early May 2015 and the sentence handed down on 18 May 2015. Thus, approximately 16 months passed from committal to sentence. It was held that the delay was ‘unremarkable’.<sup>72</sup> By contrast, in *O’Brien v The Queen*,<sup>73</sup> there was a 16-month period between the making of the complaint and charges being laid against the offender, and this was held to constitute a relevant delay. Similarly in *Sabra v The Queen* (‘*Sabra*’),<sup>74</sup> a delay of 17 months between the making of admissions by the offender and charges being laid was sufficient to invoke the principle. While the latter two cases suggest that a relatively short timeframe enlivens delay as a mitigating factor, this is contradicted by other cases where longer delays did not mitigate sentence.

The Queensland Court of Appeal in *R v Moxon*<sup>75</sup> therefore held that little weight should be accorded to delay despite that fact that there was more than a five-year period between the authorities investigating a matter and charging the offender. President McMurdo held that while the offender had rehabilitated during this period, this was not mitigatory because the offender was businessman, father and responsible member of the community and ‘[h]is prospects of rehabilitation were therefore always excellent, irrespective of the delay’.<sup>76</sup> Further, in *Luong v The Queen*<sup>77</sup> no discount was accorded for delay despite a two-and-a-half-year gap between detection of the relevant fraud and the charging of the offender. Justice Price (Hoeben CJ at CL and Fullerton J agreeing) of the Court of Criminal Appeal of New South Wales declined to reduce the penalty on account of delay because there was no evidence of inconvenience caused to the offender arising from the lapse of time. However, as we have seen, generally such evidence is not necessary, which underlines the inconsistent manner in which delay is applied by sentencing courts. Justice Price relevantly stated:

In my view, it was open to the Judge to find that the delay was not such that it ameliorated the sentence. ... The applicant did not give evidence of any uncertain suspense or strain suffered as a result of the delay. This was not a stale offence but one that had been discovered by the victim after the applicant had defrauded him for over two and a half years. If the applicant had any concerns about delay in the

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<sup>71</sup> [2016] VSCA 276.

<sup>72</sup> *Ibid* [32].

<sup>73</sup> [2014] VSCA 94 (‘*O’Brien*’).

<sup>74</sup> (2015) 257 A Crim R 33, 46 [41].

<sup>75</sup> [2015] QCA 65.

<sup>76</sup> *Ibid* [37].

<sup>77</sup> [2014] NSWCCA 129 (‘*Luong*’).

prosecution of the fraud offence, it was always open to him to bring his offending to the attention of the police. The Judge was entitled to express her reservations about the applicant's remorse and prospects of rehabilitation. I am not persuaded that the applicant suffered detriment by the delay that entitled him to an element of leniency.<sup>78</sup>

Curiously, the Court gave no weight to delay in this case despite the fact that it endorsed<sup>79</sup> the comments of Wood CJ at CL in *R v Blanco*, where his Honour stated that a 'measure of understanding' needs to be accorded when a delay occurs.<sup>80</sup>

Thus, there is not even an approximate period of time that needs to elapse before delay can operate to mitigate a sentence.

### G *Delay Can Be a Weighty Consideration*

As noted in the introduction to this article, sentencing courts do not ascribe a specific weight to each of the mitigating (or aggravating) considerations. Consequently, despite the uncertainty surrounding the precise circumstances in which delay can reduce penalty severity, it is clear that when delay is operative it can considerably reduce the penalty for an offence.<sup>81</sup> The considerable weight that is accorded to delay on the basis of the fairness limb alone is demonstrated by *Tones* where the sentence reduction was in the order of 25% to 50% for child sex offence charges.<sup>82</sup>

In light of the above discussion, I now examine whether there is a doctrinally sound basis for mitigating penalties on account of delay.

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<sup>78</sup> Ibid [42].

<sup>79</sup> Ibid [40].

<sup>80</sup> *Blanco* (n 40) 306 [16].

<sup>81</sup> See also *Merrett* (n 24); *R v Tiburcy* (2006) 166 A Crim R 291; *R v Tezer* [2007] VSCA 123; *R v Kane* [1974] VR 759, 767 (Gowans, Nelson and Anderson JJ); *Thompson* (n 62) 100 (Street CJ); *R v Shore* (1992) 66 A Crim R 37, 46–7 (Badgery-Park J); *R v Braham* (1994) 116 FLR 38, 50 (Angel J); *Mill* (n 25); *Prehn v The Queen* [2003] TASSC 55; *Schwabegger* (n 2); *Law* (n 24); *Tamamovich v The Queen* [2011] VSCA 330; *R v WAS* [2013] QCA 93; *O'Brien* (n 73); *R v Illin* (2014) 246 A Crim R 176; *Underwood v The Queen (No 2)* [2018] VSCA 87 (because the offender was in custody during the period of delay).

<sup>82</sup> *Tones* (n 42) [47]. The Court of Appeal described this as 'very generous': at [48]. The key delay in this case consisted of six years between when the complainants reported the matter to police in 2007 and when the accused was charged in 2013: at [6]. See also Part I of this article.

### III ANALYSIS OF RATIONALE FOR DELAY IN SENTENCING

#### A *The Fairness Limb*

As noted above, delay is a commonly invoked mitigating ground. Despite this, the doctrinal underpinnings of delay as a mitigating factor are unclear. To some extent, this is because there are numerous circumstances in which delay operates to reduce penalty and arguably this has discouraged attempts to improve the coherency of this area of the law. Nevertheless, in order for delay to maintain its role in the sentencing calculus, it is necessary for a justification to be established, as opposed to simply being assumed.

I now analyse the appropriateness of delay as a mitigating factor in sentencing, commencing with an examination of the fairness limb. As we have seen, current orthodoxy provides that the fairness limb is one of two reasons underpinning delay as a sentencing factor. This is grounded in the notion that the accused endures inconvenience and stress, stemming from the long wait for the criminal justice process to arrive at a sentence.<sup>83</sup> There are, however, several problems manifest with this limb.

The first is that in accordance with the current evidential approach, the fairness limb is grounded in speculative considerations. In order to enliven this limb, as noted above, generally there is no need for offenders to establish that the wait for the sentence has caused them actual stress or inconvenience. The fairness limb of delay is based on inferred, as opposed to demonstrated, inconvenience. While it is tenable to postulate that offenders would prefer not to have a long delay between the commission of the offence and their sentencing, it is no less equally plausible to suggest that in some (and in fact many) circumstances offenders are advantaged by delay because it provides them with a greater opportunity to plan for any sentence that they may receive. Delay in finalising a case allows offenders time to complete or progress any objectives, projects and activities that they are undertaking including, for example: bracing themselves emotionally and psychologically for a prison term; putting in place support structures for their family should they be sent to prison; transitioning their business dealings and employment activities; and organising financial matters. This is a matter that has in fact been noted by Wood J (Gleeson CJ and Barr J agreeing) in *R v V*:

As was pointed out in *Thompson* each case depends on its own circumstances. In some instances the delay can operate to the offender's advantage so far as it provides an opportunity, for example, for the offender to establish a new life ...<sup>84</sup>

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<sup>83</sup> See Part II above.

<sup>84</sup> (1998) 99 A Crim R 297, 300. This was endorsed in *Luong* (n 77) [41] (Price J). In the broader context it should be acknowledged that the expectation of timeliness is associated with the right to fair trial, however, this is not a legally enforceable expectation. As noted by Mason CJ in *Jago v District Court (NSW)* (1989) 168 CLR 23, 33: '[T]he Australian common law does not recognize the existence of a special right to a speedy trial, or to trial within a reasonable time ... there is no constitutional guarantee of a speedy trial, the remedies are discretionary ...'. See also *R v Clarkson* [1987] VR 962, 972.

The key point being that there is no intrinsic and obvious part of human nature that suggests that people prefer to bring forward experiences that are inevitable and unpleasant; certainly not to the extent that delaying an unpleasant experience should reduce the severity to which a wrongdoer should be subjected.

While there is some intuitive appeal with invoking delay as a mitigating factor, intuition is not a basis for adjusting benefits and burdens. Further, there is no obvious counter-intuition associated with the view that individuals benefit from extending the time frame in which they are sentenced. A post-reflective consideration of the consequences of delay establishes concrete reasons why an individual might in fact benefit from a considerable passing of time between the commission of the crime and the time in which they are sentenced. The proposition that delay can advantage offenders is supported by the fact that offenders often seek to adjourn the commencement of legal proceedings. A New South Wales study showed that less than 40% of listed trials proceeded at the first listing date.<sup>85</sup> The main reason for this was late guilty pleas and the second most common reason was an adjournment as a result of an application made by defence counsel.<sup>86</sup> In addition to this, it has been noted that offenders often enter a guilty plea at a very late stage for numerous reasons, including the hope that the matter will be withdrawn due to a lack of evidence or that a witness will become less credible due to the effluxion of time.<sup>87</sup> Further, in the study it was expressly noted that defendants who face a term of incarceration are advantaged by a delay because this equates to more time in the community.<sup>88</sup>

There is also a significant additional problem associated with the fairness limb of delay. This is pragmatic, as opposed to principled, but perhaps equally intractable. Considerable rule of law issues are raised by the fact that there are not even approximate parameters regarding the length of delay that is required before a penalty reduction can be accorded. In addition to this, there is also no guidance regarding whether any reduction stemming from delay should be commensurate with the length of delay. In order for an individual's legal interests to be impacted there should be some parameters guiding the process, otherwise the transparency and predictability of the law is diminished.<sup>89</sup> Sentencing is, as noted above, an opaque and

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<sup>85</sup> Don Weatherburn and Joanne Baker, *Managing Trial Court Delay: An Analysis of Trial Case Processing in the NSW District Criminal Court* (New South Wales Bureau of Crime Statistics and Research, 2000) 17 ('*Managing Trial Court Delay*'). The survey period was from 2 August 1995 to 1 October 1999. See also Don Weatherburn and Joanne Baker, *Delays in Trial Case Processing: An Empirical Analysis of Delay in the NSW District Criminal Court* (2000) 10(1) *Journal of Judicial Administration* 6.

<sup>86</sup> Weatherburn and Baker, *Managing Trial Court Delay* (n 85).

<sup>87</sup> Jason Payne, 'Criminal Trial Delays in Australia: Trial Listing Outcomes' (Research and Public Policy Series No 74, Australian Institute of Criminology, 2007) 47.

<sup>88</sup> *Ibid.*

<sup>89</sup> Geoffrey de Q Walker, *The Rule of Law* (Melbourne University Press, 1988) 3; Joseph Raz, *The Authority of Law* (Clarendon Press, rev ed, 1979) ch 11, 214–16; John Finnis, *Natural Law and Natural Rights*, ed Paul Craig (Oxford University Press, 2<sup>nd</sup> ed, 1980) 270–6; HLA Hart, 'Discretion' (2013) 127(2) *Harvard Law Review* 652.

to some extent impressionistic area of the law.<sup>90</sup> Thus, it has been noted that in any case, ‘there is no single correct sentence’<sup>91</sup> and that the ‘instinctive synthesis will, by definition, produce outcomes upon which reasonable minds will differ’.<sup>92</sup> However, even in this context it is difficult to find examples of more nebulous considerations that impact sentencing decisions than delay. Thus, even inherently vague considerations which are very difficult to ascertain, such as remorse, require some validation and hence there is no basis for enabling delay to operate in such an obscure manner.<sup>93</sup>

In order for delay to legitimately reduce a sentence it is important that at a minimum, the courts (or legislators) develop criteria regarding acceptable and unacceptable time limits for a criminal matter to be finalised. Arguably, this criticism is not insurmountable, because at least theoretically, it might be possible to develop these time limits in a number of ways. The most obvious is to set temporal measures which prescribe, albeit crude, time frames for when delay can reduce sentence. A number of different time frames would need to be developed to deal with the typical situations when delay becomes relevant. By way of example, a norm could be established such that delay becomes relevant when the period between charging and sentencing is more than, say, two years,<sup>94</sup> or when the period between the commission of the offences and the sentence is more than five years. Guidelines of this nature would need to be flexible enough to accommodate other common variables, such as the reasons for the delay — and in particular, the role of the offender in contributing to or causing the delay. It is the need to accommodate these many variables, and the lack of a coherent doctrinal basis upon which to anchor these factors, that creates considerable doubt about the possibility of developing systematic, principled guidelines under this limb. In any event, until a tenable model of this nature is developed, a strong case for abolishing the fairness limb of delay can be mounted.<sup>95</sup>

It is important to note that delay can in some instances cause tangible, as opposed to speculative, disadvantages to offenders. The recommendation that the fairness limb

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<sup>90</sup> See *Markarian* (n 19).

<sup>91</sup> *Ibid* 301 (Gleeson CJ, Gummow, Hayne and Callinan JJ), 405 (Kirby J).

<sup>92</sup> *Hudson v The Queen* (2010) 30 VR 610, 616.

<sup>93</sup> For further discussion of remorse as a sentencing consideration, see further below in Part III, Section B.

<sup>94</sup> Another could be by reference to the norms in a particular jurisdiction, where, for example, the average times for finalising criminal matters are regarded as acceptable but anything beyond that as justifying some level of mitigation.

<sup>95</sup> As discussed below in Part III, Section E, it is possible to set out guidelines in relation to specific and narrow causes of delay, such as where it is caused by the operation of the court system. Legislation, which sets relatively prescriptive sentencing reductions for pleading guilty (see for example, *Sentencing Act 2017* (SA) ss 39–40; *Sentencing Act 1995* (WA), s 9AA) could also be used as a model for designating the nature of discount that should be accorded. This is made possible by the fact that there is data regarding the typical institutional time frames from the finalisation of criminal matters, but this approach cannot be applied in the context of the many other more amorphous situations where delay occurs.

of delay be abolished does not include circumstances when tangible disadvantage is caused. Instead, this disadvantage should be accommodated within the sentencing calculus. When there is a considerable delay before an offender is sentenced, this can result in a harsher penalty regime being applicable at the time of sentencing,<sup>96</sup> or an offender no longer being eligible to be prosecuted as a child offender<sup>97</sup> or result in a deterioration of the health of the offender,<sup>98</sup> all of which make it more burdensome to deal with the impact of a criminal sanction. However, all of these discrete concrete burdens are independent mitigating factors.<sup>99</sup> In these circumstances, the manner in which the changed circumstance is dealt with is governed by principles which do not involve consideration or application of the fairness limb of delay.<sup>100</sup> Thus, these considerations cannot provide a logical or jurisprudential anchor for the fairness limb and are not discussed further in this article.

I now analyse the rehabilitation limb of delay, which I argue should also be abolished.

### B *The Rehabilitation Limb*

The other basis upon which delay reduces penalty is the rehabilitation limb. As we have seen, a key distinction between the operation of this limb and the fairness limb is that the former is enlivened more readily when the offender has caused the delay.<sup>101</sup> Despite the fact that the rehabilitation limb has a greater scope for operation than the fairness limb the rationale in support of it is, in fact, less compelling. The key aspect about the rehabilitation limb is that the consideration that is driving the relevant inquiry and potential penalty adjustment is the extent to which the offender has reformed their mindset. However, there is no necessary nexus between delay and rehabilitation. Delay is simply a vehicle which can sometimes facilitate the rehabilitation of an offender. And importantly, rehabilitation is itself a well-established, distinct mitigating factor.

Prior to elaborating on this, I provide a brief overview of the role of rehabilitation (which is not associated with delay) in the sentencing inquiry. In *Vartzokas v Zanker*,<sup>102</sup> King CJ stated that rehabilitation aims to re-establish offenders as

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<sup>96</sup> See *GPR v The Queen* [2007] NTCCA 12; *Katsis v The Queen* [2018] NSWCCA 9; *Radenkovic v The Queen* (1990) 170 CLR 623.

<sup>97</sup> See *Strickland v The Queen* [2011] NSWCCA 166; *R v Boland* (2007) 17 VR 300.

<sup>98</sup> See *R v Smith* (1987) 44 SASR 587; *R v Magner* [2004] VSCA 202; *Hicks v The Queen* [2016] VSCA 162.

<sup>99</sup> See, eg, *Leighton v The Queen* [2010] NSWCCA 280.

<sup>100</sup> See the cases cited immediately above relating to each of these considerations.

<sup>101</sup> See Part II of this article.

<sup>102</sup> (1989) 51 SASR 277.

‘honourable law-abiding members of the community’.<sup>103</sup> In a similar vein, it has been observed that rehabilitation aims to ensure that ‘the sentence imposed is consistent, if possible, with the offender’s returning to society as a contributing member’.<sup>104</sup> In more direct terms, it has been noted that rehabilitation consists of attitudinal reform which makes it less likely that an offender will reoffend.<sup>105</sup> Thus, the essence of rehabilitation is a changed attitudinal disposition in an offender, which is more conducive of law-abiding behaviour.

While there is no set criteria regarding how courts assess rehabilitation, the two most well-established considerations that are suggestive of good prospects of rehabilitation are youth<sup>106</sup> and an absence of prior convictions.<sup>107</sup> More fully, in *Elyard v The Queen*,<sup>108</sup> Basten JA noted that in evaluating an offender’s prospects of rehabilitation, the court will normally look at a range of matters including:

- (a) evidence of the past conduct and behaviour of the offender;
- (b) professional opinions, taking into account past conduct and behaviour and expressing views as to future prospects, and
- (c) at least in some cases, the opinions and expressions of intention of the offender himself or herself.<sup>109</sup>

It follows by looking at the nature of rehabilitation and the considerations which the courts look to for its presence, that rehabilitation and delay are logically and pragmatically distinct considerations. Delay merely sometimes provides the backdrop to an offender making progress toward rehabilitation.

Moreover, rehabilitation is an independent, stand-alone, sentencing consideration. Rehabilitation is expressly set out as a sentencing objective in the sentencing statutes

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<sup>103</sup> Ibid 279. This approach was also endorsed in *EF v The Queen* [2015] NSWCCA 36, [52] quoting *R v Pogson*; *R v Lapham*; *R v Martin* (2012) 82 NSWLR 60, 87 [122] (McClellan CJ at CL and Johnson J).

<sup>104</sup> *R v Valentini* (1980) 48 FLR 416, 420.

<sup>105</sup> A similar definition is adopted by Frances A Allen, ‘Criminal Justice, Legal Values and the Rehabilitative Ideal’ (1959) 50(3) *Journal of Criminal Law and Criminology* 226.

<sup>106</sup> *R v Gordon* [2011] QCA 326, [40]–[41]; *R v Mills* [1998] 4 VR 235.

<sup>107</sup> *R v GDP* (1991) 53 A Crim R 112; *R v E (a child)* (1993) 66 A Crim R 14, 32; *KT v The Queen* (2008) 182 A Crim R 571; *R v MD* (2005) 156 A Crim R 372; *R v PP* (2003) 142 A Crim R 369.

<sup>108</sup> (2006) 45 MVR 402 (‘*Elyard*’).

<sup>109</sup> Ibid [19]. See also *LJP v Western Australia* [2010] WASCA 85; *Skipworth v Western Australia* [2008] WASCA 64, [13] (McLure JA); *Cameron v The Queen* (2002) 209 CLR 339, 357–60 [65] (‘*Cameron*’).

of all Australian jurisdictions<sup>110</sup> and is also a mitigating factor at common law.<sup>111</sup> There are, in fact, two ways in which rehabilitation can reduce penalty severity. First, as we have seen, good prospects of rehabilitation is itself a mitigating factor. Second, it can result in more weight being accorded to rehabilitation as a sentencing objective and accordingly less emphasis being placed on other sentencing objectives which incline in favour of harsher penalties, namely community protection, specific deterrence and general deterrence.<sup>112</sup> When an offender is found to have good prospects of rehabilitation, the fact that this might have occurred in the context of a delay between the offending behaviour and the sentence is irrelevant to the impact that rehabilitation will have on the ultimate sanction.

Remorse is a well-established, independent mitigating factor in all Australian jurisdictions (and which we have seen is also a consideration that can enliven the rehabilitation limb of delay).<sup>113</sup> The presence of remorse can operate to significantly reduce the severity of the punishment meted out to an accused. As was explained in *Neal v The Queen*:

Contrition, repentance and remorse after the offence are mitigating factors leading in a proper case to some, perhaps considerable, reduction of the normal sentence.<sup>114</sup>

Remorse, for sentencing purposes, is a feeling of regret or sorrow for what one has done.<sup>115</sup> While remorse often underpins rehabilitation, the two are distinct mitigating considerations because they do not always co-exist.<sup>116</sup> The main rationale for

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<sup>110</sup> *Crimes (Sentencing) Act 2005* (ACT) s 7(1)(d); *Crimes Act 1914* (Cth) s 16A(2)(n); *Crimes (Sentencing Procedure) Act 1999* (NSW) ss 3A, 21A(3)(h); *Sentencing Act 1995* (NT) s 5(1)(b); *Penalties and Sentences Act 1992* (Qld) s 9(1)(b); *Criminal Law (Sentencing) Act 1988* (SA) s 10(1)(m); *Sentencing Act 1997* (Tas) s 3(e)(ii); *Sentencing Act 1991* (Vic) s 5(1)(c); *Sentencing Act 1995* (WA) ss 33F(1)(a), 65(1)(a), 67(1), 71(1)(a), 74(1), 84B(1)(a).

<sup>111</sup> Mackenzie and Stobbs (n 11) 48–9; Odgers (n 11). See also *Yardley v Betts* (1979) 22 SASR 108, 112 (King CJ); *R v Willisroft, Weston, Woodley & Robinson* [1975] VR 292, 303–4 (Starke J); *Duncan* (n 39) 749; *Dadleh v South Australian Police* (1996) 66 SASR 352, 355 (Perry J); *R v Fabian* (1992) 64 A Crim R 365; *R v Denyer* [1995] 1 VR 186, 192–4 (Crockett J).

<sup>112</sup> Mirko Bagaric, Richard Edney and Theo Alexander, *Sentencing in Australia* (Thomson Reuters, 5<sup>th</sup> ed, 2018) ch 9.

<sup>113</sup> *R v Shannon* (1979) 21 SASR 442, 452 (King CJ); *R v Thomson* (2000) 49 NSWLR 383, 412 [118] (Spigelman CJ); *Cameron* (n 109); *Davy v The Queen* (2011) 207 A Crim R 266.

<sup>114</sup> *Neal v The Queen* (1982) 149 CLR 305, 315 (Murphy J) ('Neal'). See also *R v Starr* [2002] VSCA 180, [25]–[28] (O'Bryan AJA); *Murphy v The Queen* [2000] TASSC 169, [18]–[19] (Slicer J). A case where considerable weight is given to remorse is *CD v The Queen* [2013] VSCA 95 ('CD').

<sup>115</sup> *R v Young (A Pseudonym)* [2019] NSWDC 55, [65] (Haesler SC DCJ).

<sup>116</sup> Odgers (n 11).

ascribing weight to remorse in the sentencing calculus is because of the assumption that repentant offenders accept that their behaviour was wrong and are presumably less likely to reoffend.

From the pragmatic perspective, it is often difficult for the courts to identify remorse because it is sometimes viewed as consisting of ‘self-serving untested statements’.<sup>117</sup> As was noted by Winneke P of the Victorian Court of Appeal in *R v Whyte*:

It has been said, in my opinion properly, that it is rare to find convincing evidence of genuine remorse. Indeed, remorse is an elusive concept which is not to be confused with such emotions as self-pity.<sup>118</sup>

The problems associated with ascertaining true expressions of remorse are notoriously difficult and led Asche CJ in *R v Jabaltjari* to remark that

[t]he difference between being sorry for what one has done and sorry for being caught is a difference which judges may not always wish to investigate too thoroughly.<sup>119</sup>

Despite this, there are several indicia which are often viewed as being suggestive of remorse, including: pleading guilty; cooperating with police; making reparation; extending an apology; and self-inflicting injuries or attempting suicide.<sup>120</sup>

Irrespective of the pragmatic difficulties associated with identifying remorse, the important point for the purposes of this article is that it too is a stand-alone mitigating factor.<sup>121</sup> Remorse can sometimes operate in the context of offenders who experience delay, but this link is merely contingent. In order for remorse to apply, it is unnecessary to refer to the period of time between the offence or charges being laid and the sentencing.

Thus, there is no logical or doctrinal reason to bring in the notion of delay in order to justify reducing sentences where the offender has rehabilitated or displayed remorse. Delay, at best, is the backdrop against which rehabilitation or remorse occur, but it is a legally irrelevant backdrop. There is no need to call-in delay to mitigate sentence. This is demonstrated by the inescapable reality that (i) rehabilitation and remorse are stand-alone mitigating factors, and (ii) there is no suggestion that these considerations mitigate more powerfully when contrition or rehabilitation occur a long time after the offence.

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<sup>117</sup> *Alvares v The Queen* (2011) 209 A Crim R 297, 315 [50], quoting *R v Qutami* (2001) 127 A Crim R 369, 380 [79] (Spigelman CJ).

<sup>118</sup> *Whyte* (n 63) [21] (Winneke P).

<sup>119</sup> *R v Jabaltjari* (1989) 64 NTR 1, 10.

<sup>120</sup> New South Wales Law Reform Commission, *Sentencing* (Discussion Paper No 33, 1996) [5.66].

<sup>121</sup> *Neal* (n 114); *CD* (n 114).

Put slightly differently, it is clear that if a court finds that an offender has demonstrated strong progress towards rehabilitation, the offender will get the same discount whether they are sentenced one year or 10 years after the offence. There is no additional or reduced rehabilitation adjustment on account of the extent of the delay. In circumstances when an offender shows contrition or progress towards reform well after the crime, delay is not the actual basis for the penalty reduction; rather it is merely the instrumental basis through which a well-established sentencing aim assumes relevance in sentencing process. Of course, a long period of good conduct by a historic offender is usually more compelling evidence of rehabilitation than a promise to comply with the law in the future. However, the difference between these matters goes to the question of whether a court as a matter of fact should find that the offender has meaningful prospects of rehabilitation. Delay is only one of many considerations that can impact this inquiry. Other considerations can include, for example, the extent of the prior criminality of the offender and any counselling and educational programs undertaken by the offender since the offence.

It follows that the rehabilitation limb is futile. It does no logical or doctrinal work in the sentencing calculus. Judgments that refer to delay as a mitigating consideration on the basis of rehabilitation would be no less accurate or sound if they did not refer to delay and merely set out the rehabilitation which had occurred. There is in fact some existing judicial support for this position. In *Bell v The Queen*, Anderson J stated that

[t]he mere fact that an offender has led a blameless life between the time of the offences and the time of sentencing is not necessarily an indication of rehabilitation, especially in cases of intra-familial sexual abuse of young children. There may be explanations for the cessation of offending other than genuine rehabilitation, the most obvious of which might be that the child or children have left home or have matured to a stage at which the offender can no longer get away with his or her offending. In this respect, there is a distinction, and I think an important distinction, to be made between cases in which all that appears is that the offender has not been convicted of any offence between the time of the offences and the time of sentencing and cases in which there are genuine claims to rehabilitation and remorse ... In my opinion, this case is a case of mere lapse of time, as in *Sell v The Queen*, without any factors positively emerging in favour of leniency during the period between the cessation of the offending and the passing of sentence.<sup>122</sup>

Thus, in this case Anderson J made a clear distinction between delay per se (which should not mitigate) and delay which can provide the opportunity to rehabilitate or display remorse (which can mitigate). In a similar vein, in *Scook*, Buss JA expressly stated that

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<sup>122</sup> *Bell* (n 50) [10], [13]. In this case, Anderson J also gave no weight for delay on account of the fairness limb: at [8].

delay is not, of itself, a mitigating factor ... [However, it] may be conducive to the emergence of mitigating factors; for example, if, during the period of delay, the offender has made progress towards rehabilitation or other circumstances favourable to him or her have emerged ...<sup>123</sup>

His Honour further outlined other circumstances under which delay could be a mitigating factor, such as

if: (a) the delay has resulted in significant stress for the offender or left him or her, to a significant degree, in ‘uncertain suspense’; or (b) during the period of delay the offender has adopted a reasonable expectation that he or she would not be charged ...<sup>124</sup>

Similar sentiments were also expressed by Blue J in *R v Pickard* who stated:

Mere unnecessary delay, without being coupled with relevant changes occurring during the delay, is not usually a reason in itself to reduce or suspend a sentence if otherwise indicated ...<sup>125</sup>

However, in *Sabra*, Bellew J (Meagher JA and Schmidt J agreeing) noted that this approach is not consistent with the weight of authority and that, in fact, delay can mitigate even without evidence of a relevant change to the offender’s circumstances. His Honour stated that Blue J’s view was

not wholly consistent with the decisions of this Court in *Blanco*, *King*, *Gay* and *Giourtalis*. Generally speaking, those decisions support the proposition that delay can be relevant at a number of levels, and that it can operate to mitigate an otherwise appropriate sentence in the absence of evidence that it caused a particular change in an offender’s circumstances.<sup>126</sup>

It could be contended that despite the sentiments expressed in *Sabra*, the courts often only apply the rehabilitation limb of delay when there is evidence of rehabilitation, and hence there is no reason to formally abolish this limb. If this is correct, it is in fact a strong justification in favour of abolishing the rehabilitation limb of delay — there is no utility in retaining a legal norm which is futile. However, the better view is that abolishing the delay rehabilitation limb will demonstrably improve the law. First, it will clarify and simplify the law by ensuring that the court’s time and focus is not consumed by consideration of a superfluous factor. In addition to this, the proposed reform is likely to substantively improve this aspect of sentencing law by ensuring that judges and lawyers are less likely to misapply the delay rehabilitation

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<sup>123</sup> *Scook* (n 52) 176 [58], [62].

<sup>124</sup> *Ibid* [63]. These comments have been endorsed in a number of judgments: see, eg, *Giourtalis* (n 56) [1790] (Bathurst CJ); *R v Donald* [2013] NSWCCA 238, [45] (Latham J).

<sup>125</sup> [2011] SASFC 134, [95].

<sup>126</sup> *Sabra* (n 2) 45 [40].

limb (as a result of focusing on delay per se and as opposed to its instrumental role in the context of rehabilitation) and it will enhance the integrity of the law by clarifying the scope of a mitigating factor.

Thus, it follows that neither of the existing rationales which are currently invoked to justify mitigating penalties on the basis of delay are sound. Consequently, delay should be abolished as a sentencing factor unless another justification applies. It is to this that I now turn.

### C Coherency with Other Mitigating Factors

While the orthodox rationales in support of delay as a sentencing consideration do not justify it as a mitigating factor, this does not necessarily mean that delay has no role in sentencing. It may be that it can be justified by reference to a different rationale. To this end, there are two possible approaches. The first reference point is coherence with existing mitigating rationales. Surveying existing mitigating factors could provide a grounding for arguing by analogy or from doctrinal consistency that delay should operate to reduce sentence severity. While as noted below, there is no overarching theory of mitigation in sentencing, established mitigating factors can be divided into four categories.<sup>127</sup> The first are those relating to the offender's response to a charge, which include pleading guilty,<sup>128</sup> cooperating with law enforcement authorities<sup>129</sup> and remorse.<sup>130</sup> The second are factors that relate to the circumstances of the offence and which contribute to, and to some extent explain, the offending. These include mental impairment,<sup>131</sup> duress<sup>132</sup> and provocation.<sup>133</sup> The third category includes matters personal to the offender, such as youth,<sup>134</sup> previous

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<sup>127</sup> See Victorian Sentencing Committee, *Sentencing: Report of the Victorian Sentencing Committee* (Victorian Attorney-General's Department, 1988) 359–60.

<sup>128</sup> See *Cameron* (n 109).

<sup>129</sup> See *R v Cartwright* (1989) 17 NSWLR 243, 252 (Hunt and Badgery-Parker JJ); *R v El Hani* [2004] NSWCCA 162, [66] (Howie J); *TXT v Western Australia* (2012) 220 A Crim R 266, 270–1 [28] (Buss JA).

<sup>130</sup> *Whyte* (n 63); *Barbaro v The Queen* (2012) 226 A Crim R 354; *Phillips v The Queen* (2012) 37 VR 594.

<sup>131</sup> See *R v Tsiaras* [1996] 1 VR 398; *Muldock v The Queen* (2011) 244 CLR 120; *R v Verdins* (2007) 16 VR 269; *R v Puc* [2008] VSCA 159.

<sup>132</sup> *Tiknius v The Queen* (2011) 221 A Crim R 365.

<sup>133</sup> *Tao Va v The Queen* (2011) 37 VR 452. It should be noted that when the latter three considerations apply in an extreme form they can constitute either a full defence to a crime (in the case of mental impairment or duress) or a partial defence in some jurisdictions (as is the situation with provocation). See also Mirko Bagaric et al, *The Criminal Law of Victoria, New South Wales and South Australia* (Thomson Reuters, 2019) chs 4, 14–15.

<sup>134</sup> *R v Neilson* [2011] QCA 369; *R v Kuzmanovski; Ex parte A-G (Qld)* [2012] QCA 19, [15]–[16] (Fraser JA).

good character,<sup>135</sup> old age<sup>136</sup> and good prospects of rehabilitation.<sup>137</sup> The impact of the sanction is the fourth broad type of mitigating factor and includes considerations such as onerous prison conditions,<sup>138</sup> poor health<sup>139</sup> and public opprobrium.<sup>140</sup>

Delay does not neatly fit into these categories. The only plausible alignment that delay has with these considerations is with the last category — the impact of the sanction. The fairness delay limb is grounded in the view that delayed sentencing can cause anxiety and distress to offenders. However, as we have seen above, on a closer examination this assessment is flawed.

While delay does not align with existing established categories of mitigating factors, potentially it could be justified by reference to an overarching sound theory of mitigation, which has a reformist component. Given the existing array of mitigating and aggravating factors, there is no established theory which explains and justifies these considerations. However, it has been suggested that there is scope to develop further mitigating (and aggravating) factors if they promote a sentencing objective.<sup>141</sup> As discussed above, the key sentencing objectives are community protection, general deterrence, specific deterrence, rehabilitation, retribution and denunciation.<sup>142</sup> The only tenable sentencing objective which delay falls into is rehabilitation, but as noted above this cannot provide an independent foundation for delay to operate to reduce penalty.

Thus, it follows that even by taking a broad consideration of aggravating and mitigating factors, there is no basis for anchoring delay as a mitigating factor. Delay should be abolished as a sentencing consideration.

D *Subsidiary Argument for Limiting the Relevance of Delay:  
People Should Not Benefit from Their Own Wrongdoing*

One further matter that merits discussion regarding both the fairness and rehabilitation limbs of delay is that there is potentially an additional ground for abolishing their application in some contexts. As we have seen, the courts are at times reluctant to accord significant mitigation when the reason for the delay is caused by the offender — this is especially in relation to the fairness limb. Arguably, this reluctance

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<sup>135</sup> Although it has limited weight in relation to white collar offenders: *R v Coukoulis* (2003) 7 VR 45, 59–60 [42] (Ormiston JA).

<sup>136</sup> *Gulyas v Western Australia* (2007) 178 A Crim R 539; *R v RLP* (2009) 213 A Crim R 461.

<sup>137</sup> *R v Osenkowski* (1982) 30 SASR 212; *R v Skilbeck* [2010] SASCF 35; *Elyard* (n 108).

<sup>138</sup> *Western Australia v O’Kane* [2011] WASCA 24; *Tognolini v The Queen* [2012] VSCA 311.

<sup>139</sup> *Dosen v The Queen* [2010] NSWCCA 283; *AWP v The Queen* [2012] VSCA 41.

<sup>140</sup> *Ryan v The Queen* (2001) 206 CLR 267 (‘Ryan’).

<sup>141</sup> Warner et al (n 1).

<sup>142</sup> See Part II of this article.

should be firmed into a concrete principle. This is because to allow delay to justify a sentencing reduction in such circumstances conflicts with another principle of justice: that individuals should not benefit from their own wrongdoing.<sup>143</sup> This principle is forcefully articulated by Ronald Dworkin and is manifested in several areas of law, including the forfeiture rule at common law (which disentitles murderers from taking property entitlements from their victims).<sup>144</sup> Pursuant to this principle, it can be argued that offenders who cause or contribute to a delay in the finalisation of their case should not be eligible for a ‘delay discount’. Shades of the principle are reflected in comments by Nettle JA where the court declined to accord significant weight to delay in circumstances where it was partly attributable to the fact that the offender did not facilitate the investigation of a complex deception matter. His Honour stated:

It would be both illogical and contrary to ordinary notions of justice and fairness if a sentencing judge were precluded from taking into account the extent to which the offender had stood by declining to do whatever he or she could do to bring the matter to fruition.<sup>145</sup>

The ‘no benefit from own wrongdoing’ principle arguably applies less or perhaps not at all to situations where the delay arises not from the acts of the offender but from their omissions. In this context, the most common omission by an offender which leads to a delay in finalising a criminal case is where an offender does not voluntarily disclose that they are the perpetrator of a crime. To invoke the ‘no benefit from one’s own wrongdoing’ principle in this situation would be to impose a positive obligation on offenders to report their own crimes. This expectation is contrary to existing orthodoxy. There is no sentencing principle which, for example, makes it an aggravating factor for offenders to conceal their crimes. The fact that offenders are not expected to come forward and report their crimes is further underlined by the fact that voluntary disclosure of offending is a stand-alone mitigating factor, and one which often applies very powerfully.<sup>146</sup> Thus, it would take a considerable (and almost certainly improbable) shift from the prevailing expectations for the ‘no benefit from own doing’ principle to abolish a delay as a mitigating consideration in

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<sup>143</sup> See generally Ronald Dworkin, *Law’s Empire* (Fontana Press, 1986).

<sup>144</sup> The principle can be traced to *Cleaver v Mutual Reserve Fund Life Association* [1892] 1 QB 147, where a woman who killed her husband was barred from benefiting from his life assurance policy. The Court held that ‘no system of jurisprudence can with reason include amongst the rights which it enforces rights directly resulting to the person asserting them from the crime of that person’: at 156. See also *Helton v Allen* (1940) 63 CLR 691, 709 (Dixon, Evatt and McTiernan JJ). For a discussion of the principle, see Andrew Hemming, ‘Killing the Goose and Keeping the Golden Nest Egg’ (2008) 8(2) *Queensland University of Technology Law and Justice Journal* 342; Carla Spivack, ‘Killers Shouldn’t Inherit from Their Victims or Should They?’ (2013) 48(1) *Georgia Law Review* 145.

<sup>145</sup> *Day v The Queen* [2011] VSCA 243, [18]. See also *Giourtalis* (n 56) [1791].

<sup>146</sup> *R v Ellis* (1986) 6 NSWLR 603, 604 (Street CJ); *Latina v The Queen* [2015] VSCA 102; *DPP (Vic) v CPD* (2009) 22 VR 533; *Ryan* (n 140) 294–7 (Kirby J).

circumstances where the delay arises from the fact that the offender did not voluntarily disclose their involvement in a crime.

However, the ‘no benefit from own wrongdoing’ principle can be used to negate or attenuate mitigation which is grounded in changed circumstances, (such as rehabilitation or experiencing anxiety) which occur during a period of delay caused by active unreasonable steps taken by an offender in a bid to frustrate legal proceedings — for example where offenders pursue clearly unmeritorious defences. Thus, if the recommendations in this article for fully abolishing delay are not adopted, this principle should be applied to at least negate the relevance of delay where offenders cause the delay.

*E Abolishing Delay as a Mitigating Factor Will Not Further  
Slow Down the Criminal Justice System*

As we have seen, court processing times in Australia for criminal matters are relatively slow. This is undesirable. There is a strong interest in the expeditious finalisation of criminal matters from the interests of victims, the community and the offenders.<sup>147</sup> Moreover, long delays in criminal matters diminish the rectitude and quality of decision-making in this area. Delay increases the likelihood of witness unavailability and reduces the accuracy of witness memory and often the availability of other sources of evidence.<sup>148</sup> A possible counter to the proposal to abolish delay as a mitigating factor is that it will remove one of the incentives to expeditiously finalise criminal matters. While this is not a particularly strong argument, it merits some consideration for reasons of comprehensiveness.

The considerations that influence the timeliness of criminal matters are essentially institutional, and in particular the amount of government resourcing to agencies in the criminal justice sector, and in particular police, prosecutors and the courts. There is no evidence that providing (or not providing) a discount to offenders on account of delay would influence government spending and priorities concerning the criminal justice sector. This is evident from the fact that the current approach which provides a discount on the basis of delay is at odds with the ‘tough on crime’ policy that permeates much of the criminal justice sector throughout Australia.<sup>149</sup> Further, there has been no suggestion that governments should increase spending on courts because the current system facilitates the more lenient treatment of offenders.

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<sup>147</sup> The desirability for trials to be quickly processed is observed most readily in the United States where the accused has a constitutional ‘right to a speedy and public trial’: *United States Constitution* amend VI. See, eg, Susan L Thomas, ‘When Does Delay in Imposing Sentencing Violate Speedy Trial Provision’ (1991) 86 *American Law Reports* (4<sup>th</sup> ed) 340. However, this right does not apply post-conviction, since sentencing does not form part of the ‘trial’ process: see *Barker v Wingo*, 407 US 514 (1972); *United States v Ray*, 578 F 3d 184 (2<sup>nd</sup> Cir, 2009).

<sup>148</sup> Payne (n 87).

<sup>149</sup> Mirko Bagaric and Athula Pathinayake, ‘Jail Up; Crime Down Does Not Justify Australia Becoming an Incarceration Nation’ (2015) 40(1) *Australian Bar Review* 64.

The only consideration, which seems to have influenced the criminal justice system to expedite the finalisation of criminal matters, is the welfare of victims. Hence, we see that in some jurisdictions stricter time frames are imposed for the hearing of sexual offence matters in order to reduce anxiety felt by complainants in these cases.<sup>150</sup> Thus, abolishing mitigating considerations on account of delay is likely to have no effect on the progress of criminal matters and the rate at which they are finalised.

#### IV CONCLUSION

Delay is a mitigating factor which is regularly invoked by sentencing courts and one which can sometimes result in a considerable penalty reduction. Somewhat curiously (given the frequency with which delay is applied by sentencing courts), the scope and parameters of when delay can mitigate penalty are poorly defined. There is not even approximate guidance regarding the length of time that needs to elapse before this ground is enlivened. This is unacceptable from the perspective of transparency and consistency in judicial decision-making.

Perhaps even more problematic is the fact that the doctrinal underpinnings of delay have not been carefully examined, and the principle is not firmly grounded. To the extent that delay has undergone judicial evaluation, the courts have attempted to ground the principle in two rationales.

The first is that it is unfair for an offender to have to wait a considerable period of time to learn their fate because this causes the offender anxiety and stress. This rationale is flawed because it can be asserted with equal persuasion that offenders are advantaged by having additional time to arrange their affairs before they are subjected to a criminal sanction. While the uncertainty associated with the outcome of a criminal prosecution is undesirable, this can arguably be offset (as opposed to being exacerbated) if offenders have appropriate time to prepare themselves for the sanction they might receive in order to optimally organise their affairs before sentencing.

The second rationale for delay is grounded in offender rehabilitation or remorse that sometimes occurs after an offence. However, rehabilitation and remorse are well-established existing, independent mitigating factors. The fact that an offender may express contrition or become less inclined to commit crime after either a long or short period following the offence is irrelevant to the application of these mitigating grounds, and there is no basis for according additional mitigation where remorse or rehabilitation arises a long time after the offence.

Thus, neither of the existing rationales justify the preservation of delay as a mitigating factor. Moreover, delay cannot be justified on the basis of coherence with existing sentencing considerations or by reference to alignment with other sentencing

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<sup>150</sup> See, eg, *Criminal Procedure Act 2009* (Vic) ss 211–12.

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objectives (other than rehabilitation). It follows that delay should be abolished as a sentencing consideration. The only qualification to this is in relation to offenders who are remanded in custody pending the finalisation of their case, and this would only mitigate penalty when the offender did not contribute to the delay. The reform proposed in the article would simplify this area of sentencing law and enhance its coherency, while not compromising the pursuit of any sentencing objectives.



## WHEN CHARITY NO LONGER BEGINS AND ENDS AT HOME: THE AUSTRALIAN GOVERNMENT'S REGULATORY RESPONSE TO CHARITIES OPERATING OVERSEAS

### ABSTRACT

In a world in which charitable activities are increasingly crossing national borders, the Australian Government has had to reconsider its regulation of cross-border charity. Recent developments have resulted in a number of proposed regulatory reforms and a new tax ruling directly impacting Australian charities operating overseas. This article evaluates the government's existing and proposed measures to regulate Australian cross-border charity in a changing global landscape. In doing so, it examines whether the promised reforms will enable the government to fulfil its policy goals of reducing the administrative complexity for Australian charities operating overseas and safeguarding their charitable assets, while ensuring that public trust and confidence in these charities is preserved.

### I INTRODUCTION

In a world in which charity has become globalised,<sup>1</sup> governments have had to confront the reality that charity no longer begins and ends at home. In 2017 more than 4,500 charities,<sup>2</sup> or almost 10% of all charities in Australia, reported operating overseas<sup>3</sup> — a significant increase from 6.1% of charities in 2013.<sup>4</sup>

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\* Lecturer, The University of Sydney Law School. I would like to thank Myles McGregor-Lowndes, Simon Rice and the anonymous referees, for their valuable comments on earlier drafts of this paper.

<sup>1</sup> See Lester M Salamon, S Wojciech Sokolowski and Regina List, 'Global Civil Society: An Overview' in Lester M Salamon and S Wojciech Sokolowski (eds), *Global Civil Society: Dimensions of the Nonprofit Sector* (Kumarian Press, 2004) vol 2, 3; Lester M Salamon, *New Frontiers of Philanthropy* (Oxford University Press, 2014) 5.

<sup>2</sup> Charities are a subset of not-for-profit (or nonprofit) organisation that meet the statutory definition of charity under the *Charities Act 2013* (Cth).

<sup>3</sup> This includes transferring funds or goods, or delivering programs, outside Australia. Data is derived from the Australian Charities and Not-for-Profits Commission's ('ACNC') Annual Information Statement: see ACNC, *Australian Charities Report 2017* (Report, 2018) 8.

<sup>4</sup> Natasha Cortis et al, *Australian Charities Involved Overseas 2014* (Report, 2016) 11.

More than three-quarters of these charities report transferring funds overseas,<sup>5</sup> with payments to non-resident organisations amounting to more than \$1 billion annually.<sup>6</sup> While the growth in Australian charities operating overseas has brought widespread benefits to the global community, it has also created regulatory concerns for the Australian government regarding the potential for such charities to be misused for terrorist financing and other criminal purposes.<sup>7</sup> As a result, the government has had to reconsider the regulation of cross-border charity. In doing so, it has announced new tools to regulate charities operating overseas as part of a reform package for charities with deductible gift recipient ('DGR') status to 'strengthen governance arrangements, reduce administrative complexity and ensure continued trust and confidence in the sector',<sup>8</sup> allocating \$5.7 million for this purpose in 2017.<sup>9</sup>

Regulation of the charitable sector is similar to regulation of the for-profit sector in that it can be broadly conceptualised as both preventing the occurrence of certain undesirable activities that may occur (a 'red light' or 'prohibitive' concept), while enabling the sector to thrive (a 'green light' or 'facilitative' concept).<sup>10</sup> However, regulation of the charitable sector is distinct from regulation of other sectors in that charities are not primarily engaged in profit-making activities, but are 'ultimately driven by pursuit of public or community benefit'.<sup>11</sup> The concept of 'public benefit' is central to the legal definition of charity in Australia;<sup>12</sup> charities are defined as

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<sup>5</sup> Abigail Powell et al, *Australian Charities Report 2016* (Report, 2017) 11.

<sup>6</sup> Australian Bureau of Statistics, *Australian National Accounts: Non-Profit Institutions Satellite Account, 2012–13* (Catalogue No 5256.0, 28 August 2015) table 10.1.

<sup>7</sup> See Natalie Silver, Myles McGregor-Lowndes and Julie-Anne Tarr, 'Should Tax Incentives for Charitable Giving Stop at Australia's Borders?' (2016) 38(1) *Sydney Law Review* 85, 109–13.

<sup>8</sup> Kelly O'Dwyer, 'Reforming Administration of Tax Deductible Gift Recipients' (Media Release, Department of Treasury, 5 December 2017). Following changes to the federal Government's ministry in August 2018, Kelly O'Dwyer, who was sponsoring these reforms, is no longer the Minister responsible. The new Minister is Senator Zed Seselja, who has responsibilities for the ACNC and other aspects of charity policy.

<sup>9</sup> See Scott Morrison and Mathias Cormann, 'Mid-Year Economic and Fiscal Outlook 2017–18' (Budget Release, December 2017) 110–11.

<sup>10</sup> See Robert Baldwin, Martin Cave and Martin Lodge, *Understanding Regulation: Theory, Strategy and Practice* (Oxford University Press, 2<sup>nd</sup> ed, 2012) 3. See also Oonagh B Breen, Patrick Ford and Gareth G Morgan, 'Cross-Border Issues in the Regulation of Charities: Experiences from the UK and Ireland' (2009) 11(3) *International Journal of Not-for-Profit Law* 5, noting that for the nonprofit sector regulation may be 'controlling' or 'facilitative': at 6.

<sup>11</sup> Joyce Chia et al, 'Regulating the Not-for-Profit Sector' (Working Paper, The University of Melbourne Law School, July 2011) 5. See also Susan Pascoe, 'Regulating the Not-for-Profit Sector' (State Services Authority, January 2008) 5.

<sup>12</sup> This originated in the common law model of charity as enunciated by Lord Macnaghten in *Commissioners for Special Purposes of the Income Tax v Pemsel* [1891] AC 531, 583: "Charity" in its legal sense comprises four principal divisions:

not-for-profit organisations with charitable purposes that are for the public benefit.<sup>13</sup> Since 2012, the Australian Charities and Not-for-Profits Commission ('ACNC'), has served as Australia's national charity regulator.<sup>14</sup> Registration as a charity with the ACNC, while voluntary, is a necessary precondition to access federal tax concessions from the Australian Taxation Office ('ATO'),<sup>15</sup> including exemption from income tax, goods and services tax concessions, fringe benefits tax concessions and gift deductibility.<sup>16</sup> As the gatekeeper of the charitable tax concessions, the ATO also plays a significant role in the regulation of the charitable sector.

The concept of public benefit underlies these tax concessions, based on the rationale that charities are entitled to tax relief because they are supplying underfunded public goods that would not otherwise be supplied by the private marketplace or the state.<sup>17</sup> Under this rationale, tax concessions represent government subsidies, and their role is to support the charitable sector to provide public goods within the fiscal state.<sup>18</sup>

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trusts for the relief of poverty; trusts for the advancement of education; trusts for the advancement of religion; and trusts for other purposes beneficial to the community, not falling under any of the preceding heads'.

<sup>13</sup> *Charities Act 2013* (Cth) s 5. The Act has codified the common law definition of charity and expanded the definition of a 'charitable purpose' (s 12) to include health, education, public welfare, religion, culture, reconciliation, human rights, security, animal welfare and the environment, as well as a general catch-all provision in s 12(1)(k).

<sup>14</sup> The ACNC was established as Australia's first national regulator on 3 December 2012: see ACNC, 'Not-for-Profit Reform and the Australian Government' (Guide, January 2013) 4.

<sup>15</sup> See *Australian Charities and Not-for-Profits Commission Act 2012* (Cth) s 10-5 ('ACNC Act').

<sup>16</sup> There are also refunds of franking credits. Tax concessions are also available at the state level relating to stamp duty, payroll tax and land tax: 'Charity Tax Concessions', ACNC (Web Page, 19 June 2017) <<https://www.acnc.gov.au/tools/factsheets/charity-tax-concessions>>.

<sup>17</sup> This is based on Burton Weisbrod's 'public goods theory of nonprofit organisations': see Burton Weisbrod, 'Toward a Theory of the Voluntary Non-Profit Sector in a Three-Sector Economy', in Edmund S Phelps (ed), *Altruism, Morality, and Economic Theory* (Russell Sage Foundation, 1975) 171, 171–96. Weisbrod's theory has been expanded and revised over the years. See in particular, Henry Hansmann, 'The Role of Nonprofit Enterprise' (1980) 89(5) *Yale Law Journal* 835; Henry Hansmann, 'Economic Theories of Non-Profit Organisations' in Walter W Powell (ed), *The Nonprofit Sector: A Research Handbook* (Yale University Press, 1987) 27, 29. Hansmann proposed a contract failure theory pursuant to which nonprofits arise as trustworthy alternatives to meet the demand for their goods due to 'contract failure' between consumers (who cannot accurately assess the public goods provided) and for-profit firms (that have 'both the incentive and the opportunity to take advantage of customers by providing less service to them than was promised and paid for'): at 29.

<sup>18</sup> See Miranda Stewart, 'The Boundaries of Charities and Tax' in Matthew Harding, Ann O'Connell and Miranda Stewart (eds), *Not-for-Profit Law: Theoretical and Comparative Perspectives* (Cambridge University Press, 2014) 251–2. See also Rick

Indeed, until recently the government's longstanding policy has been that apart from a few exceptions, charitable tax concessions should directly benefit the Australian public,<sup>19</sup> leaving little scope for tax relief for charities operating outside Australia.

With the ultimate goal of public benefit, the government has three stated objects for charity regulation by the ACNC. These are:

- (a) to maintain, protect and enhance public trust and confidence in the Australian not-for-profit sector;
- (b) to support and sustain a robust, vibrant, independent and innovative Australian not-for-profit sector; and
- (c) to promote the reduction of unnecessary regulatory obligations on the Australian not-for-profit sector.<sup>20</sup>

These broad objectives can be achieved through facilitative 'green light' regulation, in which a supportive framework is created to promote a flourishing charitable sector, as well as through prohibitive 'red light' regulation, restricting activities that do not conform to the strict standards imposed by the law.<sup>21</sup> The ATO's regulatory objectives are focused primarily on fiscal concerns relating to the taxpayer funded charitable concessions, by limiting access to these tax concessions or restricting the rights of registered charities to engage in certain activities. A recent review of the legislative framework regulating the charitable sector highlighted the need to find a balance between these potentially competing objectives of red tape reduction and support for the sector on the one hand, and public expectations of transparency, accountability and good governance on the other.<sup>22</sup>

While the government has not articulated a specific regulatory approach with clearly stated objectives for the subsector of charities operating overseas, it is possible to derive objectives for this subsector based on the objectives for the wider charitable

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Krever, 'Tax Deductions for Charitable Donations: A Tax Expenditure Analysis' in Richard Krever and Gretchen Kewley (eds), *Charities and Philanthropic Institutions: Reforming the Tax Subsidy and Regulatory Regimes* (Comparative Public Policy Research Unit, Monash University, 1991) 5.

<sup>19</sup> See Silver, McGregor-Lowndes and Tarr (n 7) 88; Stewart (n 18) 244.

<sup>20</sup> *ACNC Act* (n 15) s 15-5(1).

<sup>21</sup> See Oonagh B Breen, Alison Dunn and Mark Sidel, 'Regulatory Waves: An Introduction' in Oonagh B Breen, Alison Dunn and Mark Sidel (eds), *Regulatory Waves: Comparative Perspectives on State and Self-Regulation Policies in the Nonprofit Sector* (Cambridge University Press, 2017) 4.

<sup>22</sup> Department of Treasury, *Strengthening for Purpose: Australian Charities and Not-for-Profits Commission Legislation Review* (Report, 22 August 2018) 8 ('*ACNC Legislation Review*'), which evaluated the effectiveness of the *ACNC Act* (n 15) and the *Australian Charities and Not-for-Profits Commission (Consequential and Transitional) Act 2012* (Cth).

sector. The first object, of maintaining and enhancing public trust and confidence, can be further distilled into mitigating the risk of charities operating overseas being misused for terrorist financing and other criminal purposes.<sup>23</sup> The second and third objects, of sustaining the vibrancy and independence of the charitable sector, while promoting the reduction of unnecessary regulatory obligations, can be further refined into the objectives of facilitating efficient and legitimate cross-border charitable flows. Like the broader charitable sector, for the subsector of charities operating overseas the government must balance the objectives of reducing the regulatory burden and allowing this subsector to thrive, while ensuring adequate oversight of cross-border charity. However, recent developments, detailed below, indicate that the government has not been effective in maintaining this balance. In recognition of this, there has been an increased regulatory focus on this subsector.

The first of these developments can be traced to criticism of the government for its inadequate monitoring of cross-border charity from the Financial Action Task Force ('FATF'), an intergovernmental body that promotes the implementation of measures for combating terrorist financing and money laundering in compliance with its recommendations.<sup>24</sup> FATF assesses terrorist financing vulnerabilities and threats faced specifically by the nonprofit sector through its Recommendation 8, which serves as an international policy standard influencing the domestic regulation of charities operating overseas. In an evaluation report of Australia in 2015, FATF rated Australia 'non-compliant' with Recommendation 8, finding that 'Australia has not implemented a targeted approach nor has it exercised oversight in dealing with nonprofit organisations that are at risk from the threat of terrorist abuse'.<sup>25</sup> It concluded that Australia's supervisory framework for nonprofits was wanting, leaving them 'vulnerable to misuse by terrorist organisations'.<sup>26</sup>

The government responded to this criticism by conducting a National Risk Assessment into the charitable sector in 2016.<sup>27</sup> Based on an evaluation of more than 250,000 registered nonprofits, the Assessment found that while there were few proven instances of money laundering and terrorism financing, there remained a 'medium' risk level of organisations being misused for such purposes.<sup>28</sup> Recommendations from the Assessment focused on measures to strengthen the oversight and monitoring of international charitable activities.<sup>29</sup> FATF subsequently amended

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<sup>23</sup> See Silver, McGregor-Lowndes and Tarr (n 7) 109, 113.

<sup>24</sup> Australia is a founding member of FATF, which was established in 1989. See 'Australia', *FATF* (Web Page, 2019) <<http://www.fatf-gafi.org/countries/#Australia>>.

<sup>25</sup> FATF, *Anti-Money Laundering and Counter-Terrorist Financing Measures — Australia, Mutual Evaluation Report* (Report, April 2015) ('*FATF Report 2015*').

<sup>26</sup> *FATF Report 2015* (n 25) 16.

<sup>27</sup> ACNC and Australian Transaction Reports and Analysis Centre ('AUSTRAC'), *Australia's Non-Profit Organisation Sector: Money Laundering and Terrorism Financing Risk Assessment* (Report, August 2017) ('*National Risk Assessment*').

<sup>28</sup> *Ibid* 39.

<sup>29</sup> *Ibid*.

Recommendation 8, after finding that the nonprofit sector's vulnerability to terrorist abuse may previously have been overstated given that 'not all [nonprofits] are inherently high risk (and some may represent little or no risk at all)'.<sup>30</sup> In its revised Recommendation 8, FATF emphasised the need for governments to adopt 'effective and proportionate measures, which should be commensurate to the risks identified through a risk-based approach' and that 'respects countries' obligations under the *Charter of the United Nations* and international human rights law'.<sup>31</sup> In a follow-up report on Australia in 2018, FATF found that Australia was 'largely compliant' with the revised Recommendation 8, commending the 'comprehensive risk assessment' Australia had taken of its nonprofit sector.<sup>32</sup>

At the same time, the need for additional oversight of the subsector of charities operating overseas was raised in connection with a new tax ruling by the ATO in connection with charities classified as public benevolent institutions.<sup>33</sup> This tax ruling directly impacts the ability of Australian charities to receive tax deductible donations for their international activities.<sup>34</sup> It addresses the requirement in the income tax legislation that an organisation must be resident 'in Australia' to obtain DGR status.<sup>35</sup> Under a previous ruling, the ATO had interpreted this 'in Australia' condition strictly, requiring that a DGR 'be established, controlled, maintained and operated in Australia' and have 'its benevolent purposes' in Australia.<sup>36</sup> This interpretation significantly restricted the ability of Australian organisations operating overseas to use tax deductible donations for their international activities. Signalling a shift in approach, the ATO withdrew this ruling in May 2017,<sup>37</sup> citing a statement by the ACNC Commissioner that an organisation 'is not precluded from being registered as a [public benevolent institution] subtype of charity if it has a main purpose of providing benevolent relief to people residing overseas'.<sup>38</sup> In March 2018, the ATO announced it was developing a new

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<sup>30</sup> FATF, *International Standards on Combatting Money Laundering and the Financing of Terrorism & Proliferation: The FATF Recommendations* (Report, June 2019) 54.

<sup>31</sup> *Ibid* 52–3.

<sup>32</sup> FATF, *Anti-Money Laundering and Counter-Terrorist Financing Measures — Australia: 3rd Enhanced Follow-Up Report* (Report, July 2018) 4 ('*FATF Report 2018*').

<sup>33</sup> Australian Taxation Office, *Income Tax: The 'in Australia' Requirement for Certain Deductible Gift Recipients and Income Tax Exempt Entities* (TR 2019/6, 18 December 2019). Public benevolent institutions are a type of charity whose main purpose is to be a charitable institution with a main purpose of providing benevolent relief to people in need: see *ACNC Act* (n 15) s 25-5(5) col 2, item 6.

<sup>34</sup> See Natalie Silver, Myles McGregor-Lowndes and Julie-Anne Tarr, 'Delineating the Fiscal Borders of Australia's Nonprofit Tax Concessions' (2016) 14(3) *eJournal of Tax Research* 741, 764.

<sup>35</sup> See *Income Tax Assessment Act 1997* (Cth) s 30-15 ('*ITAA 1997*').

<sup>36</sup> Australian Taxation Office, *Income Tax and Fringe Benefits Tax: Public Benevolent Institutions* (TR 2003/5, 4 June 2003) [129].

<sup>37</sup> Australian Taxation Office, *Income Tax and Fringe Benefits Tax: Public Benevolent Institutions: Notice of Withdrawal* (TR 2003/5W, 17 May 2017).

<sup>38</sup> ACNC, *Commissioner's Interpretation Statement: Public Benevolent Institutions* (CIS 2016/03, 19 December 2016) [5.8].

public ruling on the ‘in Australia’ requirement, and in July 2018 issued a first draft for public consultation.<sup>39</sup> This draft clarified that the meaning of ‘in Australia’ simply requires that a DGR be established or legally recognised in Australia and operate in Australia,<sup>40</sup> without the need for its purposes or beneficiaries to be in Australia. As the sector awaited its publication (which occurred in December 2019), many Australian organisations took advantage of the existing legal vacuum by establishing public benevolent institutions with DGR status for the purposes of working overseas.<sup>41</sup> The resulting increase in the number of Australian charities operating abroad has signified the need for increased regulatory oversight of these organisations.

The government responded to this need as part of the reform package for DGRs set out in a consultation paper released in August 2018.<sup>42</sup> The most significant new reform measure introduced to regulate the subsector of charities operating overseas is the issuance of external conduct standards, which came into effect in July 2019. While the charity legislation has made provision for external conduct standards since its inception,<sup>43</sup> it was only following the DGR consultation paper in November 2018 that new regulations for the implementation of these standards were developed.<sup>44</sup> The stated aims of the external conduct standards are

to provide greater confidence that funds sent, and services provided, outside Australia are reaching legitimate beneficiaries and are being used for legitimate purposes ... and to prevent a registered entity from being misused by a criminal organisation.<sup>45</sup>

The standards require charities to appropriately manage their overseas activities and control of resources, conduct an annual review of these activities, ensure they have appropriate anti-fraud and anti-corruption measures in place, and protect vulnerable individuals from exploitation or abuse.<sup>46</sup>

This article considers whether the implementation of these new regulatory measures for Australian charities operating overseas, along with the existing measures governing

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<sup>39</sup> Australian Taxation Office, *The ‘in Australia’ Requirement for Certain Deductible Gift Recipients and Income Tax Exempt Entities: Draft Taxation Ruling* (TR 2018/D1, 4 July 2018).

<sup>40</sup> *Ibid* [4].

<sup>41</sup> Data from the ACNC registration database showed that the number of public benevolent institutions operating overseas steadily increased from 2013 to 2016 by an average of approximately 300 per year.

<sup>42</sup> See Department of Treasury, *Deductible Gift Recipient (DGR) Reforms* (Consultation Paper, August 2018) <<https://treasury.gov.au/consultation/c2018-t321162/>>.

<sup>43</sup> *ACNC Act* (n 15) s 50.

<sup>44</sup> See *Australian Charities and Not-for-Profits Commission Amendment (2018 Measures No 2) Regulations 2018* (Cth) (*‘ACNC Regulations 2018’*).

<sup>45</sup> *Ibid* s 50.1.

<sup>46</sup> *Ibid*.

this subsector, achieve the appropriate balance between addressing the government's regulatory concerns while facilitating legitimate and efficient cross-border charity. Part II outlines the regulatory framework that provides the theoretical basis for this analysis. Part III uses the framework to evaluate the existing and proposed tools employed by the government to regulate Australian charities operating overseas, highlighting the challenges and opportunities for policymakers in implementing the proposed reforms. Concluding thoughts are presented in Part IV.

## II REGULATORY FRAMEWORK

In their treatise on regulation, Baldwin, Cave and Lodge provide a regulatory framework that can be used to evaluate the measures adopted by governments to regulate the charitable sector.<sup>47</sup> From the starting point of capacity, a regulatory system for a particular industry or sector can be built around a set of desired policy objectives. Once the regulatory objectives are identified, the next step in the framework is 'to look for the particular mixture of regulatory strategies that will best meet desired objectives'.<sup>48</sup> In most regulatory contexts this involves determining an appropriate regulatory approach that enables the optimal combination of regulatory tools to be employed.<sup>49</sup>

Responsive regulation, developed by Ayres and Braithwaite, has been a highly influential regulatory approach utilised around the world.<sup>50</sup> In contrast to a more formalistic approach to regulation, responsive regulation requires regulators to be responsive to the conduct of those they seek to regulate in deciding whether a more or less interventionist response is required.<sup>51</sup> Using a regulatory pyramid that responds to different levels of behaviour, this approach provides the regulator with a series of strategies to achieve compliance; from the least intrusive 'light touch' measures with minimal government intervention at the base of the pyramid, to the more intrusive 'command and control' measures with defined government powers at the apex.<sup>52</sup> Responsive regulation is often used in conjunction with a risk-based

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<sup>47</sup> See generally, Baldwin, Cave and Lodge (n 10) and Jonathon Garton, *The Regulation of Organised Civil Society* (Hart, 2009).

<sup>48</sup> Ibid 132.

<sup>49</sup> Ibid. See also Lester Salamon, 'The New Governance and the Tools of Public Action: An Introduction' (2000) 28(5) *Fordham Urban Law Journal* 1611, defining tools or instruments of public action as 'an identifiable method through which collective action is structured to address a public problem': at 1641–2

<sup>50</sup> Robert Baldwin and Julie Black, 'Really Responsive Regulation' (2008) 71(1) *Modern Law Review* 59, 61.

<sup>51</sup> Ian Ayres and John Braithwaite, *Responsive Regulation: Transcending the Deregulation Debate* (Oxford University Press, 1992). See also John Braithwaite, *Restorative Justice and Responsive Regulation* (Oxford University Press, 2002) 29–34.

<sup>52</sup> Ibid 35–9.

regulatory approach.<sup>53</sup> A risk-based approach targets compliance resources based on an assessment of the risks that a regulatee poses to the regulator's objectives, enabling resources to be targeted in a manner that prioritises the highest risks.<sup>54</sup> While it emphasises intervention rather than responsiveness,<sup>55</sup> like the responsive regulatory pyramid it requires regulators to

take account of an entity's compliance performance and tailor its requirements with 'light touch' expectations for compliant and low risk bodies, moving to higher levels of monitoring and intervention for non-compliant or high risk bodies.<sup>56</sup>

In doing so, both of these approaches seek to encourage good behaviour in regulatees, while focusing the regulators' resources on bad behaviour. Both approaches have been employed by charity regulators,<sup>57</sup> enabling a range of tools to be utilised for direct regulation of this sector.<sup>58</sup>

Jonathan Garton has identified tools that the state can use to regulate the charitable sector.<sup>59</sup> It is useful to consider these tools as a hierarchy from the most facilitative, at the base of the regulatory pyramid, through to the most prohibitive, at the top of the pyramid. The most facilitative tool, appearing at the base of the pyramid, is the provision of education and advice. As a 'light touch' regulatory instrument, education and advice promotes the 'green light' concept of fostering sector growth and development in a cost-effective manner and can also serve as a preventative measure by ensuring that information regarding laws and best practice is available to the sector. However, there is no mechanism for compliance.<sup>60</sup>

On the next level of the pyramid is disclosure regulation, a moderate form of 'red light' regulation, encompassing registration and reporting requirements for charities. This has been a longstanding form of regulation used by the Charity Commission of

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<sup>53</sup> Baldwin and Black (n 50) 65. See also Julia Black, 'The Emergence of Risk-Based Regulation and the New Public Risk Management in the UK' [2005] (Autumn) *Public Law* 512.

<sup>54</sup> See Baldwin and Black (n 50) 66.

<sup>55</sup> *Ibid.* For a critique of both approaches see at 62–4, 66–7.

<sup>56</sup> See Pascoe (n 11) 4.

<sup>57</sup> The Charity Commission of England and Wales emphasises risk-based regulation. See Alison Dunn, 'Eddies and Tides: Statutory Regulation, Co-Regulation and Self-Regulation in Charity Law in Britain' in Breen, Dunn and Sidel (eds) (n 21) 28. The ACNC focuses on both risk-based and responsive regulation: see ACNC, *ACNC Regulatory Approach Statement* (Statement, 20 December 2018) <[www.acnc.gov.au/raise-concern/regulating-charities/regulatory-approach-statement](http://www.acnc.gov.au/raise-concern/regulating-charities/regulatory-approach-statement)> ('*ACNC Regulatory Approach Statement*').

<sup>58</sup> Baldwin, Cave and Lodge (n 10) 105–36.

<sup>59</sup> See Garton (n 47) 207–20.

<sup>60</sup> *Ibid.* 218.

England and Wales.<sup>61</sup> With its wide reach and relatively low cost, this tool represents a targeted and efficient use of charitable resources, and can create strong incentives for compliance. If excessive, it can also create unnecessary red tape and compliance costs for regulatees, and requires sufficient resources on the part of the regulator to monitor the submission and accuracy of the information provided.<sup>62</sup>

Moving up the pyramid is regulation by contract, which is based on the idea ‘that formal agreements render explicit the required performance standards and the acceptable level of costs, so that performance can be monitored’.<sup>63</sup> The adoption of New Public Management theory in Australia has led to the outsourcing of government services through contracts,<sup>64</sup> for services such as health, education, and welfare.<sup>65</sup> While the regulatory aspects of a contract are typically peripheral to its main purpose, they enable the government to use its spending power to achieve its desired regulatory objectives.<sup>66</sup>

At the second highest level of the pyramid is incentive-based regulation, the foundational tool for regulating the charitable sector, given that all other regulatory measures derive from the preferential tax treatment granted to charities and their donors. Under incentive-based regulation, the government imposes negative or positive taxes or deploys grants and subsidies from the public purse.<sup>67</sup> This important regulatory instrument allows the government to guide the sector towards (or away from) certain activities. These charitable tax concessions come with their own inspection and enforcement mechanisms in the form of investigations and audits.

At the apex of the pyramid is ‘command and control’ regulation, employed through imposing strict standards, and prohibiting activities which do not conform to those standards through penalties and sanctions for non-compliance.<sup>68</sup> This strict form of ‘red light’ regulation has the benefit of outlawing some forms of behaviour and in doing so, provides a means for ensuring compliance. At the same time, it can produce a proliferation of complex and inflexible rules resulting in over-regulation,<sup>69</sup> presenting particular challenges for the charitable sector where many organisations do not have the capacity or resources to navigate onerous and costly regulation.<sup>70</sup>

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<sup>61</sup> Ibid 217.

<sup>62</sup> Baldwin, Cave and Lodge (n 10) 120–1.

<sup>63</sup> Hugh Collins, *Regulating Contracts* (Oxford University Press, 2002) 303.

<sup>64</sup> See Myles McGregor-Lowndes, ‘Australia: Co-Production, Self-Regulation and Co-Regulation’ in Breen, Dunn and Sidel (eds) (n 21) 178–9.

<sup>65</sup> See Debra Morris, ‘Charities in the Contract Culture: Survival of the Largest?’ (2000) 20(3) *Legal Studies* 409.

<sup>66</sup> Baldwin, Cave and Lodge (n 10) 114.

<sup>67</sup> Ibid 111.

<sup>68</sup> Ibid 107.

<sup>69</sup> Ibid 108.

<sup>70</sup> See Pascoe (n 11) 5.

Outside state regulation, at the base of the pyramid is self-regulation, which occurs when entities regulate their own affairs and behaviour.<sup>71</sup> Self-regulation has emerged as a strong presence in the charitable sector,<sup>72</sup> particularly because charities are philosophically focused on their beneficiaries, creating a natural level of self-regulation.<sup>73</sup> While self-regulation lacks the enforceability of hard law regulatory instruments, its quasi-legal status can serve as an important facilitative measure to flexibly promote sector efficiency and accountability.<sup>74</sup> Peak bodies that mandate and monitor member compliance are able to promote best practice in the sector, and in doing so provide a strong basis for achieving regulatory objectives.

For government, the task becomes balancing prescriptive regulatory tools to prevent the misuse of charitable funds and safeguard the public purse, while promoting facilitative tools that enable the sector to flourish.<sup>75</sup> By combining elements of both, the government can realise the operational and relational advantages of the latter, while retaining the accountability and enforcement benefits of the former. Using this framework, the next Part evaluates the specific regulatory tools used to regulate the subsector of Australian charities operating overseas.

### III THE REGULATORY REGIME IN AUSTRALIA FOR CHARITIES OPERATING OVERSEAS

Following Baldwin, Cave and Lodge's regulatory framework, a regulatory system for the subsector of charities operating overseas can be built around a set of desired policy objectives. The government does not have clearly stated objectives for these charities. Articulating objectives would facilitate the introduction of a regulatory approach and tools that could better demonstrate the public benefit these charities provide, and therefore justify their entitlement to the tax concessions available. To do so, the government would first need to adopt an expansive view of the charitable tax concessions beyond the traditional three-sector subsidy model that

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<sup>71</sup> Baldwin, Cave and Lodge (n 10) 137.

<sup>72</sup> See generally, Breen, Dunn, and Sidel (eds) (n 21). See also Angela Bies, 'Evolution of Nonprofit Self-Regulation in Europe' (2010) 39(6) *Nonprofit and Voluntary Sector Quarterly* 1057; Susan Phillips, 'Canadian Leapfrog: From Regulating Charitable Fundraising to Co-Regulating Good Governance' (2012) 23(3) *VOLUNTAS: International Journal of Voluntary and Nonprofit Organizations* 808; Oonagh B Breen, 'Minding the Pennies: Global Trends in the Regulation of Charitable Fundraising' in Susan Phillips, Jenny Harrow and Tobias Jung (eds), *The Routledge Companion to Philanthropy* (Routledge, 2016) 229.

<sup>73</sup> Pascoe (n 11) 18.

<sup>74</sup> Baldwin, Cave and Lodge (n 10) 140.

<sup>75</sup> See Debra Morris, 'The Case of England and Wales: Striking the Right Balance of "Hard" Law versus "Soft" Law' in Susan Phillips and Steven Rathgeb Smith (eds), *Governance and Regulation in the Third Sector: International Perspectives* (Routledge, 2011) 37; Phillips (n 72); Breen (n 72) 229.

supports the provision of public goods within the fiscal state.<sup>76</sup> This would provide a policy rationale for extending the tax concessions to Australian charities operating overseas, which would more appropriately reflect the shift in the ATO's position of allowing public benevolent institutions operating overseas to qualify for DGR status. A compelling rationale for the provision of tax incentives to these charities is that they foster pluralism through a decentralised decision-making and production process for public goods that is more concerned with promoting a diverse charitable sector, wherever that may be.<sup>77</sup> This pluralism rationale suggests that the public benefiting from charity should be geographically expansive enough to enable private citizens to support a broad cross-section of organisations throughout global civil society. With no geographic limitations, the pluralism rationale would enable the government to recognise the growth in the number of Australian charities operating overseas, reflecting the changing global charitable landscape.

With this broad conception of public benefit, it is possible to identify three objectives for the regulation of this subsector based on the objectives for the charitable sector as a whole.<sup>78</sup> The first is to mitigate the risk of charities operating overseas being misused for terrorist financing and other criminal purposes, thereby maintaining public trust and confidence in these charities.<sup>79</sup> The second objective is to facilitate legitimate cross-border charity to sustain the vibrancy and independence of the subsector. The third is to create efficiencies by reducing unnecessary red tape for these charities. To ascertain whether these objectives are being met requires an examination of the approaches and tools used by the plethora of federal government agencies involved in regulating cross-border charity. These include the ACNC as the national charity regulator; the ATO with its significant regulatory role through charitable tax concessions; the Department of Foreign Affairs and Trade ('DFAT'), which is involved in the regulation of international development and relief organisations; and the Department of the Environment and Energy ('DEE'), which regulates environmental organisations operating overseas. In addition to governmental regulation, Australian

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<sup>76</sup> See Silver, McGregor-Lowndes and Tarr (n 7) 88; Stewart (n 18) 244.

<sup>77</sup> See Rob Reich, 'Toward a Political Theory of Philanthropy' in Patricia Illingworth, Thomas Pogge and Leif Wenar (eds), *Giving Well: The Ethics of Philanthropy* (Oxford University Press, 2011) 187–90; Krever (n 18) 27; Stewart (n 18) 251–2; David Duff, 'Tax Treatment of Charitable Contributions in Canada: Theory, Practice, and Reform' (2004) 42(1) *Osgoode Hall Law Journal* 47, 59. Another justification without geographic limitations is that they are a reward to individuals who choose to support socially valued undertakings and thereby contribute to a more altruistic society. See Rob Atkinson, 'Altruism in Nonprofit Organizations' (1990) 31(3) *Boston College Law Review* 501.

<sup>78</sup> These are derived from the objectives for the charitable sector as a whole. See *ACNC Act* (n 15) and accompanying text.

<sup>79</sup> See Silver, McGregor-Lowndes and Tarr (n 7) 109, 113.

international development and relief organisations engage in self-regulation through their peak body, the Australian Council for International Development ('ACFID').<sup>80</sup>

### A *The Role of the ACNC*

To meet its regulatory objectives for the charitable sector as a whole, including the subsector of charities that operate overseas, the ACNC has adopted a combination of approaches. For the first objective of mitigating the risk of charities operating overseas being misused for terrorist financing and other criminal purposes, it has adopted a risk-based approach, allocating its resources to 'those areas that present the greatest risk to public trust and confidence.'<sup>81</sup> In doing so, the ACNC has flagged money laundering and terrorism as continuing areas for directing compliance resources.<sup>82</sup> Because the charitable sector is 'not directly covered by the anti-money laundering and counter terror financing regime and is only regulated by AUSTRAC in limited circumstances',<sup>83</sup> the ACNC has gradually expanded its role in identifying terrorist financing and money laundering risks for the sector, establishing partnerships with AUSTRAC, the Australian Federal Police and the Australian Criminal Intelligence Commission ('ACIC') to share information.<sup>84</sup> In 2016, the ACNC partnered with AUSTRAC to conduct a risk assessment into the charitable sector, finding that while there were few proven instances of money laundering and terrorism financing (consistent with other assessments),<sup>85</sup> there remained a 'medium' risk level of

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<sup>80</sup> Depending on their legal status, other federal government agencies such as the Australian Securities and Investments Commission and the Australian Competition and Consumer Commission may also be involved in regulating these charities, as well as state and territory agencies through licensing and reporting obligations.

<sup>81</sup> ACNC, *ACNC Regulatory Approach Statement* (n 57). In its DGR reform package, the Commonwealth Government announced that it will provide funding to support additional reviews of charity and DGR eligibility based on risk. See O'Dwyer (n 8) 1.

<sup>82</sup> See ACNC, *Charities Compliance Report 2017* (Report, March 2018) <<https://www.acnc.gov.au/tools/reports/charity-compliance-report-2017>>.

<sup>83</sup> See Department of Treasury, *ACNC Legislation Review* (n 22) 84. The legislative framework governing this regime includes the *Anti-Money Laundering and Counter-Terrorism Financing Act 2006* (Cth) and *Financial Transaction Reports Act 1988* (Cth), supplemented by the *Criminal Code Act 1995* (Cth), which create a number of offences that are particularly relevant to charities engaged in humanitarian activities abroad, including getting funds to, from or for a terrorist organisation, providing support to a terrorist organisation, and associating with terrorist organisations.

<sup>84</sup> Department of Treasury, *ACNC Legislation Review* (n 22) 85–6.

<sup>85</sup> See AUSTRAC, *Terrorism Financing in Australia 2014* (Report, 2014) 15; AUSTRAC, *Regional Risk Assessment on Terrorism Financing 2016: South East Asia and Australia* (Report, 2016). See also Department of Treasury, *ACNC Legislation Review* (n 22), which received briefings from ACIC and AUSTRAC advising of 'a small number of charities of interest with links to terrorism-related activities in the Middle East and Western Africa' and 'a number of [persons responsible for the governance of registered charities] who are members of nationally significant organised crime groups with a suspected involvement in a range of criminal offending including the importation and distribution of illicit drugs, money laundering, tax fraud and people smuggling': at 84.

organisations being misused for such purposes.<sup>86</sup> Recommendations from the *National Risk Assessment* focused on measures to strengthen the oversight and monitoring of international charitable activities, particularly for smaller organisations that undertake activities in high-risk countries.<sup>87</sup> In its 2018 report, FATF noted ‘concerns that some smaller charities, which are identified as potentially higher-risk, are not subject to adequate monitoring’ and recommended increased monitoring for these charities by the ACNC.<sup>88</sup> To this end, legislation enacted in May 2018 provided the ACNC with direct access to AUSTRAC’s criminal intelligence database, enabling it to better detect and monitor money laundering and terrorist financing involving registered charities.<sup>89</sup> The first five-year review of Australia’s charity legislation recommended that the ‘ACNC’s regulatory approach to high-risk registered entities continue to be further developed.’<sup>90</sup>

At the same time, the ACNC has also adopted a regulatory approach that follows Ayres and Braithwaite’s responsive regulation. In doing so, it has developed a five-level ‘pyramid of support and compliance’, incorporating a range of regulatory tools.<sup>91</sup> With its regulatory pyramid, the ACNC seeks to ‘[prevent] problems by providing information, support and guidance to help charities stay on track’,<sup>92</sup> signifying a focus at the lower, non-interventionist levels of the pyramid. At the same time, the ACNC has clarified that it ‘will not hesitate to use its powers when charities do not act lawfully and reasonably’ and ‘[i]n serious cases, the appropriate response may be near or at the top of pyramid’.<sup>93</sup> This is consistent with an overall approach of encouraging good behaviour by charities, while focusing its resources on those charities who are at risk or evidence bad behaviour.

At the base of the ACNC’s regulatory pyramid is the facilitative regulatory tool of education and support, which includes the provision of guidance material and advice services. With its wide reach and relatively low cost, this tool represents a targeted and efficient use of charitable resources. For charities operating overseas, the ACNC conducts briefings on terrorist financing risks and issues guidance to assist these

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<sup>86</sup> ACNC and AUSTRAC, *National Risk Assessment* (n 27).

<sup>87</sup> *Ibid.*

<sup>88</sup> *FATF Report 2018* (n 32) 6.

<sup>89</sup> The *Crimes Legislation Amendment (International Crime Cooperation and Other Measures) Act 2018* (Cth) made the ACNC a ‘designated agency’ for the purposes of the *Anti-Money Laundering and Counter-Terrorism Financing Act 2006* (Cth).

<sup>90</sup> Department of Treasury, *ACNC Legislation Review* (n 22) 88.

<sup>91</sup> ACNC, *Regulatory Approach Statement* (n 57).

<sup>92</sup> *Ibid.* 6.

<sup>93</sup> *Ibid.* 7. This language is stronger than earlier versions, which stated that ‘[i]n most cases, [the ACNC begins] at lower levels of the pyramid and [moves] upwards only when circumstances require it. However, in serious cases the appropriate action to address an issue may be near the top of the pyramid.’ See ACNC, *Regulatory Approach Statement* (Statement, 29 February 2016) 6.

charities to minimise the risk of being used for terrorist financing.<sup>94</sup> In its most recent report on Australia, FATF found that there was room for the ACNC to develop further best practice materials for these charities.<sup>95</sup>

Further facilitative measures occur at the second level of the pyramid, with the ACNC providing more targeted regulatory advice and agreed actions to ensure compliance.

The third level is where a shift occurs from less facilitative to more prohibitive ‘proactive compliance’, whereby the ACNC uses its information gathering and monitoring powers through a number of important regulatory tools. For charities operating overseas, information gathering typically occurs at the registration stage. In order to register with the ACNC an organisation must meet the legal definition of a ‘charity’, be in compliance with the ACNC’s governance standards, and not have been listed as an organisation engaging in or supporting terrorist or other criminal activities.<sup>96</sup> This registration process enables the ACNC to assess compliance risks against its governance standards, a set of high level principles ‘that require charities to remain charitable, operate lawfully, and be run in an accountable and responsible way.’<sup>97</sup> The ACNC has identified charities operating overseas as requiring increased scrutiny at the registration stage, taking the position that ‘an organisation operating overseas will generally find it more challenging to demonstrate its compliance with the governance standards than an organisation operating solely in Australia’.<sup>98</sup> Consistent with its risk-based approach, this assessment includes a determination of the level of risk associated with the jurisdiction in, and local partners with which, the organisation operates, and whether appropriate safeguards are in place to ensure that funds sent overseas will be applied to their charitable purposes.<sup>99</sup>

The ACNC’s monitoring powers at this third level are employed through disclosure regulation. The charity legislation governing the ACNC contains reporting requirements for registered charities (unless they are subject to an exception) via the submission of an annual information statement and financial reports.<sup>100</sup> The annual

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<sup>94</sup> ‘Protecting Your Charity Against the Risk of Terrorism Financing’, *ACNC* (Web Page, 2015) <<https://www.acnc.gov.au/for-charities/manage/managing-charity-risk/protecting-your-charity-against-risk-terrorism-financing>>; ‘Checklist: Protecting Your Charity Against the Risk of Terrorism Financing’, *ACNC* (Web Page) <<https://www.acnc.gov.au/for-charities/manage-your-charity/checklist-protecting-your-charity-against-risk-terrorism-financing>>; ‘Factsheet: Overseas Aid and Development Charities’, *ACNC* (Web Page) <<https://www.acnc.gov.au/tools/factsheets/overseas-aid-and-development-charities>>.

<sup>95</sup> See *FATF Report 2018* (n 32) 5.

<sup>96</sup> *ACNC Act* (n 15) s 25-5.

<sup>97</sup> *Ibid* s 50-5.

<sup>98</sup> *ACNC, Commissioner’s Interpretation Statement: Public Benevolent Institutions* (CIS 2016/03, 19 December 2016) 11 <[http://acnc.gov.au/ACNC/Publications/Interp\\_PBI.aspx](http://acnc.gov.au/ACNC/Publications/Interp_PBI.aspx)>.

<sup>99</sup> See *ACNC, Factsheet: Overseas Aid and Development Charities* (n 94).

<sup>100</sup> *ACNC Act* (n 15) s 60-5.

information statement requires some information on cross-border charity. When reporting on the jurisdiction in which they ‘conduct activities’, charities can select ‘overseas’ and are then required to state the countries in which they operate.<sup>101</sup> Charities can also report ‘international activities’ as either their ‘main’ or ‘other’ activity,<sup>102</sup> and are then directed to specify whether the international activities involved transferring funds or goods overseas, operating overseas (including delivering programs), or ‘other’ (requiring a description).<sup>103</sup> Charities are also required to indicate any grants and donations outside Australia.<sup>104</sup>

Additionally, the ACNC now has four external conduct standards as a regulatory tool specifically directed towards the subsector of charities operating overseas.<sup>105</sup> As part of its DGR reform package, and to ensure compliance with its international obligations under FATF Recommendation 8,<sup>106</sup> particularly given the increased numbers of public benevolent institutions operating overseas, the government stated its intention to issue the external conduct standards ‘[t]o strengthen oversight of overseas activities’.<sup>107</sup> The object of the external conduct standards is to give the public confidence that funds sent outside Australia by registered charities and activities of registered charities operating outside Australia, are legitimate and are not contributing to terrorist or other criminal activities.<sup>108</sup> These standards apply to a registered entity if it operates outside Australia, or works with third parties that operate outside Australia, unless its overseas activities are ‘merely incidental’ to its operations and pursuit of its purposes in Australia.<sup>109</sup>

Standard one requires registered charities take reasonable steps to ensure that their activities outside Australia are carried out appropriately, maintain reasonable internal controls around their resources, and take reasonable steps to ensure that resources given to third parties are used in a way that is consistent with their purpose, with

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<sup>101</sup> See Powell et al (n 5) 24.

<sup>102</sup> Ibid 26–8.

<sup>103</sup> This was introduced to obtain greater detail about the nature of the international activities of Australia’s charities: see ibid 29.

<sup>104</sup> Ibid 11, 59.

<sup>105</sup> See *ACNC Act* (n 15) div 50; and *ACNC (Web Page)* <<https://www.acnc.gov.au/for-charities/manage-your-charity/governance-hub/acnc-external-conduct-standards>>.

<sup>106</sup> Department of Treasury, *Exposure Draft, Explanatory Materials: Australian Charities and Not-for-profits Commission Amendment Regulations (No 2) 2010* (Explanatory Materials, 2018) 5 <<https://static.treasury.gov.au/uploads/sites/1/2018/08/Explanatory-materials-t317739.pdf>> (‘*Explanatory Materials*’).

<sup>107</sup> O’Dwyer (n 8).

<sup>108</sup> *ACNC Act* (n 15) s 50-5(1).

<sup>109</sup> See *ACNC Regulations 2018* (n 44) s 50.4; *ACNC (Web Page)* <<https://www.acnc.gov.au/for-charities/manage-your-charity/governance-hub/acnc-external-conduct-standards>>.

reasonable controls and risk management processes in place.<sup>110</sup> The explanatory materials note that ‘what is reasonable depends on the circumstances’ and this may include a charity’s size, and the location and nature of its overseas activities.<sup>111</sup>

Standard two requires registered charities to undertake an annual review of their overseas activities and engage in record-keeping of activities on a country-by-country basis.<sup>112</sup> Given that this standard is worded in general terms, the explanatory materials state that ‘the ACNC will release guidance on the records that should be obtained and kept prior to this standard commencing’.<sup>113</sup> The explanatory materials further state that

the purpose of requiring records to be obtained and kept assists an entity to review their overseas activities and to complete an ‘overseas activity statement’, which will form part of the entity’s annual information statement that is required to be provided to the Commissioner.<sup>114</sup>

While the exposure draft made provision for an ‘overseas activity statement’ to be provided by a registered charity as part of its annual information statement,<sup>115</sup> there is no reference to such a statement in the proposed legislation.

Standard three requires that registered charities ‘take reasonable steps to minimise any risk of corruption, fraud, bribery, or other financial impropriety’ by those governing them, including by board members and trustees, and by employees, volunteers and third parties outside Australia. The standard also requires charities ‘to document any perceived or actual material conflicts of interest’.<sup>116</sup>

Standard four requires registered charities to take reasonable steps ‘to ensure the safety of vulnerable individuals outside Australia’ who receive services or benefits from the charity, or a third party in collaboration with the charity, or who ‘provide services or benefits on behalf of the charity or the third party’ to minimise the risk of these vulnerable individuals being exposed to exploitation and abuse.<sup>117</sup> Again, ‘reasonable steps’ for standards three and four will depend on the circumstances and the risks posed to the vulnerable individuals.<sup>118</sup> The Department of Treasury has

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<sup>110</sup> *Ibid* s 50.20.

<sup>111</sup> *Explanatory Materials* (n 106) 6.

<sup>112</sup> *ACNC Regulations 2018* (n 44) s 50.25.

<sup>113</sup> *Explanatory Materials* (n 106) 8.

<sup>114</sup> *Explanatory Materials* (n 106) 7.

<sup>115</sup> See *Explanatory Materials* (n 106) 7; *ACNC Act* (n 15) s 40-1; *ACNC Regulations 2018* (n 46) s 50.25(4).

<sup>116</sup> *ACNC Regulations 2018* (n 44) s 50.30(3)(b).

<sup>117</sup> *Ibid* s 50.35.

<sup>118</sup> *Explanatory Materials* (n 106) 9–10.

stated that the ACNC ‘will develop guidance materials to support charities to comply with the standards.’<sup>119</sup>

At the fourth level of the ACNC’s regulatory pyramid, graduated and proportionate sanctions are introduced for charities with significant non-compliance, including enforceable undertakings and compliance agreements, injunctions, suspension of a member of a charity’s governing body, and administrative penalties to address this non-compliance.<sup>120</sup>

At the top of the pyramid is revocation of charitable status and removal of a member of a charity’s governing body,<sup>121</sup> the ACNC’s most interventionist ‘command and control’ regulatory tools. These may be used when charities have significantly and persistently failed to comply with ACNC’s governance standards, the external conduct standards (when implemented) or reporting obligations under the *ACNC Act*, particularly where other enforcement options are not available.<sup>122</sup> If a charity’s registration is revoked, it loses its charitable status, including its access to federal tax concessions.

### B *The Role of the ATO*

The ATO is responsible for ensuring the tax compliance of charities through its review and auditing processes, adopting a responsive regulatory approach — with facilitative tools of education and advice at the base of the regulatory pyramid, moving up the pyramid to undertaking enquiries and audits, through to imposing penalties and finally revocation of DGR and tax exempt status at the apex.<sup>123</sup> In administering and enforcing tax law for charities, the ATO also utilises the important ‘red light’ tool of incentive-based regulation, located towards the top of the regulatory pyramid. For charities operating overseas, as part of the endorsement process of accessing federal tax concessions of income tax exemption and gift deductibility, the ATO assesses

<sup>119</sup> Department of Treasury, *External Conduct Standards FAQs* (Document, 2018) 3 <<https://static.treasury.gov.au/uploads/sites/1/2018/08/FAQs-t317739-1.pdf>>.

<sup>120</sup> For criminal sanctions enforcement is through the courts.

<sup>121</sup> *ACNC Regulatory Approach Statement* (n 57) 7. Compliance agreements are a recent addition to the pyramid, introduced in the most recent iteration in December 2018. A compliance agreement is an action plan developed in consultation with a charity to address identified governance issues. If the ACNC is not satisfied with a charity’s progress in addressing the concerns set out in a compliance agreement, it will consider using formal enforcement powers: see ‘Compliance Agreement’, *ACNC* (Web Page) <<https://www.acnc.gov.au/tools/topic-guides/compliance-agreement>>.

<sup>122</sup> *ACNC Act* (n 15) s 45-5, note 1; s 50-5, note 1; s 35-10(1)(c)(ii).

<sup>123</sup> See Valerie Braithwaite, ‘Responsive Regulation and Taxation: Introduction’ (2007) 29(1) *Law & Policy* 3, 4–6.

whether a charity meets the requirements contained in the tax legislation, including that an organisation be ‘in Australia’.<sup>124</sup>

For income tax exempt entities, the ‘in Australia’ requirement states that an organisation must have ‘a physical presence in Australia and, to that extent, incurs its expenditure and pursues its objectives principally in Australia.’<sup>125</sup> The ATO has clarified that operating through a division in Australia is sufficient to constitute ‘physical presence’,<sup>126</sup> while ‘principally’ should mean more than 50%.<sup>127</sup> The practical consequence is that charities with income tax exemption can only operate and have beneficiaries outside Australia provided that these overseas activities represent no more than 50% of the organisation’s total expenditure, excluding offshore distributions of gifts and government grants.<sup>128</sup> For organisations with DGR status, the ‘in Australia’ requirement states that ‘the fund, authority or institution must be in Australia’.<sup>129</sup>

For more than 50 years the ATO interpreted this ‘in Australia’ requirement to mean that a DGR must ‘be established, controlled, maintained and operated in Australia’ and have ‘its benevolent purposes’ in Australia, as expressed through a public ruling for public benevolent institutions.<sup>130</sup> In practical terms this meant that donations by Australian taxpayers made directly to a charity outside Australia were never tax deductible. It also meant that donations made to an Australian DGR for its own overseas programs were not tax deductible unless such activities were relatively minor or incidental to its Australian operations.<sup>131</sup>

However, there are some limited exceptions to this ‘in Australia’ requirement for DGR status; an organisation can obtain DGR status and use tax deductible donations

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<sup>124</sup> For endorsement as an income tax exempt entity, the charity must also (i) comply with the substantive requirements in its governing rules and (ii) apply its income and assets solely for the purpose for which it was established. For endorsement as a DGR, it must fall within a category of DGR described in s 30-B of the *ITAA 1997* (having acceptable rules for transferring surplus gifts and deductible contributions on winding up or revocation of endorsement and maintain a gift fund): see *ITAA 1997* (n 35) s 30-BA.

<sup>125</sup> *ITAA 1997* (n 35) s 50-50(1)(a). There are limited exceptions to this ‘in Australia’ provision for institutions specifically prescribed by the regulations to be tax exempt.

<sup>126</sup> Australian Taxation Office, *Income Tax: Endorsement of Income Tax Exempt Charities* (TR 2000/11, 28 June 2000) [12]–[13].

<sup>127</sup> *Ibid* [15]–[17].

<sup>128</sup> If the charity has a physical presence overseas, then the overseas activities related to the physical presence outside Australia are not included.

<sup>129</sup> *ITAA 1997* (n 35) s 30-15.

<sup>130</sup> Australian Taxation Office, *TR 2003/5* (n 36) [129]. For a discussion of the historical development of this interpretation of the ‘in Australia’ provisions, see Silver, McGregor-Lowndes and Tarr (n 34) 757–60.

<sup>131</sup> *Ibid* [130].

for its activities outside Australia if it establishes an overseas aid fund,<sup>132</sup> a developed country disaster relief fund,<sup>133</sup> a public fund on the Register of Environmental Organisations,<sup>134</sup> or if it is specifically listed by name in the tax legislation under the category of international affairs.<sup>135</sup> The majority of charities that have obtained DGR status pursuant to these exceptions, albeit few in number, are overseas aid funds established by organisations undertaking development and humanitarian activities outside Australia through the Overseas Aid Gift Deduction Scheme,<sup>136</sup> and environmental organisations operating overseas that are on the Register of Environmental Organisations (discussed below).<sup>137</sup>

These ‘in Australia’ requirements served to constrain Australian charities from operating overseas by providing strong incentives for charities and donors wishing to obtain charitable tax relief to direct their charitable activities and funds domestically. At the same time, they created challenges for monitoring cross-border charitable flows because qualified DGRs have been used by other Australian charities without DGR status as intermediaries to channel tax deductible funds abroad.<sup>138</sup> These channelling arrangements, known as ‘auspicing’, typically involve a servicing fee being paid to the intermediary DGR.<sup>139</sup> The use of this fee-paying workaround has not only stifled legitimate cross-border charitable flows and created inefficiencies, but by providing a means to circumvent the strict ‘in Australia’ DGR requirement, has also compromised the government’s ability to regulate cross-border charity through tax laws.

Two significant judicial decisions have challenged the legislative efficacy of the geographic restrictions placed around the charitable tax concessions. In *Federal Commissioner of Taxation v Word Investments Ltd*,<sup>140</sup> the High Court found that

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<sup>132</sup> *ITAA 1997* (n 35) s 30-85.

<sup>133</sup> *Ibid* s 30-86. Deductible gift recipient status for these funds is limited to two years from the date specified in a Treasury Minister’s declaration of the disaster. The ATO maintains a list of disasters that have been recognised by the Treasury since this provision was enacted in 2006. There are currently 10 disasters on this list. See Australian Taxation Office, *List of Disasters* (Web Page, 27 February 2015) <<https://www.ato.gov.au/Non-profit/Gifts-and-fundraising/In-detail/Disasters/List-of-disasters/#Developedcountrydisasterrelieffund>>.

<sup>134</sup> *ITAA 1997* (n 35) s 30-55.

<sup>135</sup> *Ibid* s 30-80. Parliament may amend the *ITAA 1997* (n 35) specifically to list individual organisations by name as a deductible gift recipient. There are currently 23 deductible gift recipients listed by name under the category of international affairs, although time limits for six of these organisations have expired.

<sup>136</sup> See Australian Taxation Office, *Income Tax: Overseas Aid Gift Deduction Scheme* (TR 95/2, 1 June 1995) [2]–[6].

<sup>137</sup> Explanatory Memorandum, *Taxation Laws Amendment Bill (No 5) 1992* (Cth), 43–44. See *ITAA 1997* (n 35) s 30-55(1) item 6.1.1.

<sup>138</sup> See Silver, McGregor-Lowndes and Tarr (n 34) 95.

<sup>139</sup> *Ibid*.

<sup>140</sup> (2008) 236 CLR 204.

sending funds abroad through a suitably qualified organisation meets the ‘in Australia’ requirement for income tax exemption. This was followed in *Federal Commissioner of Taxation v The Hunger Project Australia*,<sup>141</sup> where the Federal Court determined that Hunger Project Australia, which operated primarily as a fundraising arm for a global network of entities that provided hunger relief outside Australia, qualified as an Australian ‘public benevolent institution’<sup>142</sup> and was therefore eligible to apply for income tax exemption and DGR status. Following these decisions, the ATO, in consultation with its Not-for-Profit Stewardship Group,<sup>143</sup> adopted a more permissive approach to the tax treatment of cross-border donations.<sup>144</sup> This culminated in May 2017 when the ATO withdrew its public ruling for public benevolent institutions on the ‘in Australia’ requirements,<sup>145</sup> and issued a new public ruling in December 2019.<sup>146</sup> Importantly, this new ruling clarifies that the meaning of ‘in Australia’ in the tax legislation refers to DGRs that are ‘established or legally recognised in Australia’ and ‘makes operational or strategic decisions mainly in Australia,’<sup>147</sup> without requiring that their purposes or beneficiaries be in Australia. In the interim, many Australian organisations established public benevolent institutions with DGR status for the purposes of working overseas.<sup>148</sup> This increase in the number of Australian charities operating abroad has signified a need to ensure that there is appropriate oversight and monitoring for these organisations.

### C DFAT and the DEE

DFAT administers the Overseas Aid Gift Deduction Scheme for Australian organisations undertaking international development and relief work that establish overseas aid funds in order to qualify for DGR status under this exception to the ‘in Australia’ DGR requirement.<sup>149</sup> To qualify as an overseas aid fund under the scheme, the organisation must be registered as a charity with the ACNC, have a voluntary governing body, and be declared an ‘approved organisation’ by the Minister for

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<sup>141</sup> (2014) 221 FCR 302.

<sup>142</sup> Public benevolent institutions are charities that provide direct services to those in need of benevolent relief, or raise funds for the purpose of providing benevolent relief. See *ACNC Act* (n 15) s 25-5(5) col 2, item 6.

<sup>143</sup> See ‘Not-for-Profit Stewardship Group’, *Australian Taxation Office* (Web Page, 5 August 2019) <<https://www.ato.gov.au/General/Consultation/Consultation-groups/Stewardship-groups/Not-for-profit-Stewardship-Group/>>.

<sup>144</sup> See Silver, McGregor-Lowndes and Tarr (n 34) 763–4.

<sup>145</sup> Australian Taxation Office, *TR 2003/5W* (n 37).

<sup>146</sup> Australian Taxation Office, *TR 2019/6* (n 33).

<sup>147</sup> Australian Taxation Office, *TR 2019/6* (n 33) 3 [7].

<sup>148</sup> Data from the ACNC registration database as at 24 May 2017 shows that the number of public benevolent institutions operating overseas has been steadily increasing since 2013–2016 by an average of approximately 300 per year.

<sup>149</sup> Australian Taxation Office, *Income Tax: Overseas Aid Gift Deduction Scheme* (n 136) [2]–[3], [4]–[6]; DFAT, *Overseas Aid Gift Deduction Scheme: Guidelines* (Guidelines, February 2016).

Foreign Affairs. This is a lengthy and costly process,<sup>150</sup> resulting in less than 1% of all active DGRs qualifying as overseas aid funds.<sup>151</sup> DFAT also undertakes an accreditation process for Australian aid and development organisations which are subject to grant agreements with DFAT under the Australian NGO Cooperation Program, which provides funding to Australian organisations working in developing countries.<sup>152</sup> In addition to this rigorous accreditation process, funding under the program is subject to the Commonwealth Grants Rules and Guidelines, and implemented through a grant agreement, which contains detailed contractual provisions for ongoing monitoring and compliance, including annual reporting requirements.<sup>153</sup> The extensive accreditation process and contractual requirements result in considerable legal and administrative costs for the charities involved. Given that these charities are already regulated by the ACNC and ATO, they are subject to a particularly heavy regulatory burden.

Additionally, the DEE administers the Register of Environmental Organisations for Australian environmental organisations operating overseas that then qualify for DGR status under this exception to the ‘in Australia’ DGR requirement.<sup>154</sup> For an organisation to be entered on the Register of Environmental Organisations, the Department undertakes an initial assessment to determine whether certain legal requirements are met, including that the organisation has a principal purpose of protecting and enhancing the natural environment, after which it is passed to the Treasurer for approval.<sup>155</sup> These entry barriers have served to discourage qualifying organisations, with just over 2% of all active DGRs listed on the Register of Environmental

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<sup>150</sup> To be an ‘approved organisation’, the organisation must: (i) deliver overseas aid activities (including development and/or humanitarian assistance) in developing countries; (ii) have the capacity to manage and deliver overseas aid activities; (iii) delivered these activities in partnership with in-country organisations; and (iv) have appropriate safeguards in place and manage risks associated with child protection and terrorism: DFAT (n 149) 8–15.

<sup>151</sup> Australian Taxation Office, ‘Taxation Statistics 2012–13’ (Web Page, 28 June 2019) <<https://data.gov.au/dataset/taxation-statistics-2012-13>>.

<sup>152</sup> Other programs delivered through partnerships with NGOs include the Humanitarian Partnership Arrangement, the Africa Australia Community Engagement Scheme and the Civil Society Water, Sanitation and Hygiene Fund.

<sup>153</sup> DFAT, *Evaluation of the Australian NGO Cooperation Program Final Report* (Report, August 2015) 62 <<https://dfat.gov.au/aid/how-we-measure-performance/ode/Documents/ode-evaluation-australian-ngo-cooperation-program-final-report.pdf>>.

<sup>154</sup> Explanatory Memorandum, Taxation Laws Amendment Bill (No 5) 1992 (Cth), 43–4. See *ITAA 1997* (n 35) s 30-55(1) item 6.1.1.

<sup>155</sup> *ITAA 1997* (n 35) s 30-265(1).

Organisations.<sup>156</sup> These charities are subject to additional reporting requirements through the Register,<sup>157</sup> creating significant red tape.

The increased regulatory burden experienced by both Australian aid organisations and environmental organisations operating overseas was recognised by the government as part of the DGR reforms announced in December 2017. The government stated its intention to integrate the Overseas Aid Gift Deduction Scheme and the Register of Environmental Organisations with the ACNC charity register and abolish duplicative reporting requirements ‘to provide a streamlined experience’.<sup>158</sup> When integration of the registers occurs in 2020, the ACNC will assume all administrative responsibilities for these registers, such that DGRs listed on them will satisfy their reporting requirements by completing the ACNC’s annual information statement.<sup>159</sup>

#### D *The Role of the ACFID*

In Australia, nonprofits involved in international development and humanitarian work are subject to additional regulation in the form of sector-led self-regulation through the Australian Council for International Development (‘ACFID’). The ACFID has developed a code of conduct with which its members (representing more than 80% of private international aid in dollar terms)<sup>160</sup> must comply to ensure appropriate governance and control and risk management mechanisms are in place.<sup>161</sup> Lauded as ‘the most developed and pure self-regulatory nonprofit code in Australia’,<sup>162</sup> it represents a voluntary, self-regulatory code of good practice for Australian organisations involved in international development and humanitarian work, which aims to increase transparency and accountability and encourage effective regulation.<sup>163</sup> This is achieved through annual self-assessments and the provision of information demonstrating their continued compliance with the code.<sup>164</sup> The success of ACFID’s code as a co-regulatory tool is evidenced by its integration into DFAT’s accreditation

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<sup>156</sup> Australian Taxation Office, *Taxation Statistics 2012–13* (n 151).

<sup>157</sup> See, eg, Department of the Environment, *Register of Environmental Organisations: 2013 Statistical Return* (Online Form, 2013) <<http://www.environment.gov.au/system/files/pages/53ca6702-48ad-414a-bf24-60e253d5ad0d/files/statistical-return-2013.pdf>>.

<sup>158</sup> O’Dwyer (n 8).

<sup>159</sup> The integration, originally scheduled for July 2019, is now scheduled to take place in July 2020: see Morrison and Cormann (n 9).

<sup>160</sup> See McGregor-Lowndes (n 64) 188.

<sup>161</sup> ACFID, *ACFID Code of Conduct* (Report, 1 January 2019) <<https://acfid.asn.au/sites/site.acfid/files/ACFID%20Code%20of%20Conduct%20-%20Revised%201JAN19.pdf>> (*ACFID Code of Conduct*).

<sup>162</sup> See McGregor-Lowndes (n 64) 190.

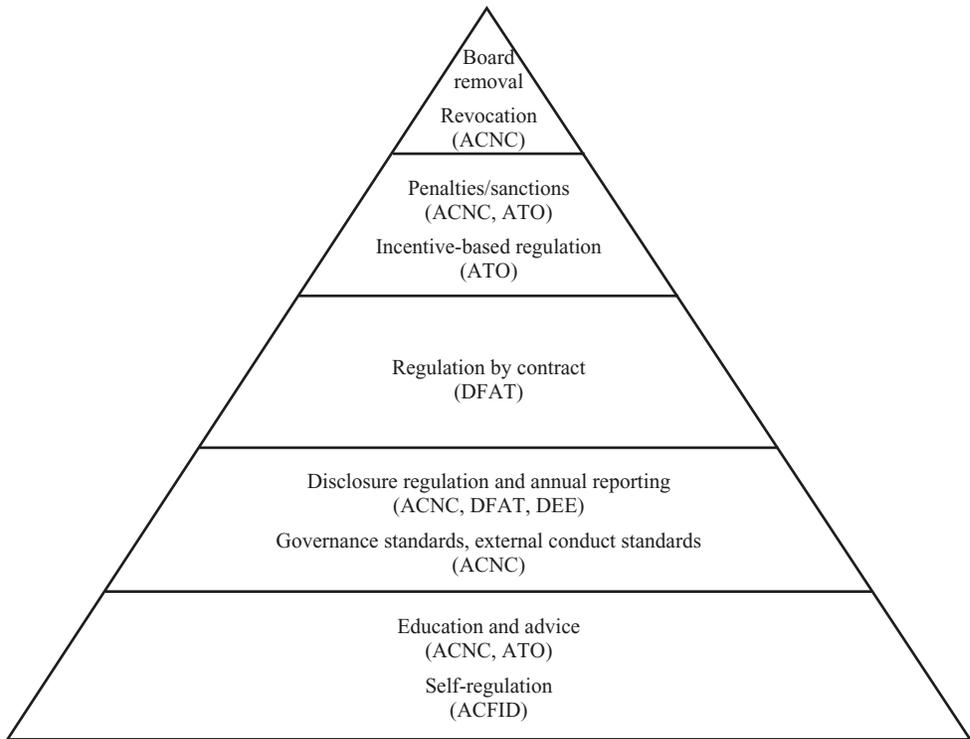
<sup>163</sup> *ACFID Code of Conduct* (n 161) 2–3.

<sup>164</sup> *Ibid* 6–7.

and funding processes.<sup>165</sup> As a co-regulatory tool, it provides significant efficiency advantages, with relatively low monitoring and enforcement costs.

### E *Evaluating the Regulatory Regime*

Analysing the regulatory regime for Australian charities operating overseas reveals the extensive array of bodies and tools that exist in Australia to regulate this subsector, illustrated in the regulatory pyramid in Figure 1 below.



**Figure 1. Regulatory Pyramid for the Subsector of Charities Operating Overseas**

From this holistic perspective, it becomes clear that there is a fragmented and complex regulatory regime governing this subsector with significant regulatory overlap, which is particularly concerning given the resource constraints of many of these organisations. This suggests that broad brushstrokes applying to the entire charitable sector may not be appropriate for what is a unique group of charities. The analysis also reveals the degree to which the various agencies involved in the regulation of this subsector have emphasised ‘red light’ measures appearing at the higher levels of the regulatory pyramid, which have contributed to the regulatory issues plaguing

<sup>165</sup> See McGregor-Lowndes (n 64) 193.

this subsector. Two significant regulatory changes have been identified that have the potential to resolve these issues.

### 1 *Implications of the New Tax Ruling*

Until recently, the most notable ‘red light’ measure affecting Australian charities operating overseas has been incentive-based regulation through the ‘in Australia’ requirements contained in the tax legislation. The ATO’s longstanding interpretation of the DGR requirement served as a disincentive for charities and their donors to engage in charitable activities overseas, stifling legitimate cross-border charitable flows. Judicial decisions precipitating a shift by the ATO towards a more permissive approach have exposed the shortcomings of this prescriptive approach that disproportionately affected the subsector of charities operating overseas. The deep flaws in this approach were exposed through the workarounds of the tax laws undertaken by organisations operating overseas who were unable to obtain DGR status as a result, creating challenges for regulators. The ATO’s shift to a less prescriptive approach, culminating in the new tax ruling for charities classified as public benevolent institutions, alleviates the need for these workarounds. At the same time, this shift creates a new regulatory concern in that there is now a two-tier system for Australian charities that operate overseas based on their classification by the ACNC for the purposes of assigning tax concessions.

On the first tier are charities operating overseas who obtained DGR status pursuant to one of the exceptions to the ‘in Australia’ requirements by establishing an overseas aid fund under the Overseas Aid Gift Deduction Scheme, or by qualifying for the Register of Environmental Organisations. To qualify, these charities are required to undertake lengthy eligibility and assessment processes that go beyond risk management.<sup>166</sup> Some of these organisations are also subject to DFAT’s accreditation process. With multiple supervisory government agencies, these organisations have also been subject to overlapping reporting requirements. While the ACNC provides a centralised regulatory infrastructure, as the ‘repository of financial and governance data’,<sup>167</sup> these organisations are subject to further disclosure regulation through DFAT or the DEE. Many of the larger international aid organisations are also subject to regulation through contractual requirements in grant agreements with DFAT, as well as self-regulation through ACFID. The result is unnecessary and excessive red tape for these organisations in terms of both assessment processes and reporting requirements, resulting in over-regulation.

On the second tier are charities operating overseas who have obtained DGR status by simply being classified as a public benevolent institution subtype of charity in the wake of the existing legal vacuum resulting from the ATO’s shift in approach on this issue.<sup>168</sup> Public benevolent institutions are not subject to the same stringent eligibility

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<sup>166</sup> For a discussion of these processes, see Silver, McGregor-Lowndes and Tarr (n 7) 96–8, 100–1.

<sup>167</sup> See McGregor-Lowndes (n 64) 197.

<sup>168</sup> See *ACNC Act* (n 15) s 25-5(5) col 2, item 6.

criteria as first tier charities, creating regulatory inequities for charities operating overseas and raising concerns that some of these public benevolent institutions may be under-regulated. This was highlighted in FATF's 2018 report,<sup>169</sup> noting that some of these smaller charities present a potentially higher risk for terrorist financing and money laundering, yet were not subject to adequate monitoring by regulators.

The government's proposed reforms, if implemented successfully, can overcome some of these concerns by ensuring that regulatory controls are consistent across all Australian charities operating overseas. Integrating the registers for the Overseas Aid Gift Deduction Scheme and the Register of Environmental Organisations with the ACNC charity register provides an opportunity to streamline the registration processes for first tier charities, while ensuring that charities across both tiers are subject to the same disclosure regulation. As this synchronisation occurs, it is critical that the ACNC apply the same eligibility criteria for first and second tier charities to achieve an appropriate balance between the stringent criteria applied to first tier charities under the Overseas Aid Gift Deduction Scheme and the Register of Environmental Organisations, with the more lenient criteria applied to second tier charities.

## *2 Introducing the External Conduct Standards*

The external conduct standards represent a new and untested 'red light' regulatory tool for post-registration monitoring. This regulatory control is particularly critical for second tier charities, as it provides an opportunity for the ACNC to engage in risk management post-registration. Some of the smaller second tier charities will need to ensure that appropriate policies and processes are put in place to comply with these standards. At the same time, the ACNC must take into consideration that many first tier charities are already subject to DFAT's accreditation and contracting processes and ACFID's code of conduct and so are likely to be in compliance with these standards. Recognition by the ACNC of these co-regulatory tools would reduce the red tape for these first tier charities, while providing cost savings for the ACNC.

The external conduct standards also provide an opportunity for the ACNC to ensure that its disclosure regulation in the form of its annual information statement adequately accommodates these standards through appropriate reporting on overseas activities. Treasury has stated that

the ACNC will begin to collect some additional information from charities' compliance with the new standards as part of the 2019–20 annual information statement ... Reporting to the ACNC on overseas activities may be required for reporting periods commencing on or after 1 July 2019.<sup>170</sup>

While there is no longer provision for an external activities statement, the ACNC has the opportunity to redesign its annual information statement to include detailed questions on cross-border activities and financing conducted outside Australia. Given

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<sup>169</sup> FATF, *FATF Report 2018* (n 32).

<sup>170</sup> Department of Treasury, *External Conduct Standards FAQs* (n 119).

that all charities operating overseas will be tracking this information for the external conduct standards, the additional regulatory burden would be minimal. At the same time, it will assist the ACNC in identifying at risk charities operating overseas and prioritising them for compliance reviews in line with its risk-based approach.

With the increased regulatory control affecting smaller charities operating overseas, it is critical that the ACNC continue to focus on the ‘green light’ facilitative measures at the base of the pyramid. The provision of education and guidance to these charities serves as a low cost and efficient means of disseminating information. The issuance of the external conduct standards will necessitate further guidance materials to support smaller charities in complying with these standards. A detailed compliance toolkit, containing information on how to manage risks when working internationally through due diligence and monitoring of funds sent overseas, would be a useful addition to the existing materials.

#### IV CONCLUSION

A changing global charitable landscape combined with an unsatisfactory domestic regulatory regime has challenged the government to rethink its regulation of the subsector of charities operating overseas. Baldwin, Cave and Lodge emphasise that regulatory approaches must respond to changes over time in order to meet new challenges, requiring ‘that regulators ... assess their own performance but also that they are able to institute the orders of change that are required for optimal regulation’.<sup>171</sup> The ACNC has assessed its own performance by conducting a national risk assessment on money laundering and terrorism financing in the nonprofit sector, concluding that there is a medium risk level of nonprofits being misused for these purposes.<sup>172</sup> Following two significant judicial decisions, the ATO has reassessed its approach to the ‘in Australia’ requirements, resulting in a shift to a more permissive approach and a new tax ruling. At the same time, Treasury has undertaken an assessment of the regulatory regime affecting charities operating overseas as part of its DGR reform package, and announced a series of reforms that will directly impact this subsector.

The promise of substantial regulatory reforms, particularly the recent introduction of the external conduct standards and integration of the DGR registers with the ACNC’s charity register, in combination with a new tax ruling, provide a timely opportunity for the government to institute the orders of change that are required for optimal regulation of Australian charities operating overseas. With disclosure regulation becoming the primary tool for regulating Australian charities operating overseas, this moderate form of ‘red light’ regulation, if implemented consistently across all Australian charities operating overseas, promises to solve some of the issues that have plagued the regulation of this subsector. In its role as the central repository for information on Australian charities operating overseas, the ACNC has the

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<sup>171</sup> Baldwin, Cave and Lodge (n 10) 132–3.

<sup>172</sup> *National Risk Assessment* (n 27).

opportunity to consolidate its position as the ‘certifier of charity trustworthiness’<sup>173</sup> and to achieve the government’s policy aims of reducing administrative complexity for this subsector, while ensuring that public trust and confidence in these charities is preserved.

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<sup>173</sup> Myles McGregor-Lowndes and Bob Wyatt (eds), *Regulating Charities: The Inside Story* (Routledge, 2017) 263.

## A SHOT IN THE DARK: AUSTRALIA'S PROPOSED ENCRYPTION LAWS AND THE 'DISRUPTION CALCULUS'

### ABSTRACT

In December 2018, in response to several foiled terrorist attacks, Australia passed some of the most intrusive telecommunications interception legislation in Australian legal history. Yet the response of the Australian Government is not a cohesive strategy designed to deal with the disruption caused by the emergence and abundance of encrypted messaging. This article deals with the legislative amendments encapsulated in the Telecommunications and Other Legislation Amendment (Assistance and Access) Bill 2018 (Cth) ('the Bill'), and addresses the issues of scope and scale which remain unresolved in spite of these changes. It then reflects upon a new concept — the 'disruption calculus' — to illustrate that the new amendments are unlikely to achieve the regulatory aims sought by intelligence and police forces in Australia. Finally, the article uses Israel's model of encryption regulation to illustrate that a more varied and holistic approach in line with the disruption calculus can provide an effective alternative for regulatory authorities in Australia

### I INTRODUCTION

**O**n the subject of individuals evading detection by law enforcement, much has been written about the promises of end-to-end encryption programs.<sup>1</sup> A number of freely available applications, such as Signal, WhatsApp, Wickr and Telegram, have grown in prominence in response (at least partly) to market

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\* JD (Southern Queensland), PhD Candidate (Swinburne); Investigations Manager, ATO.

<sup>1</sup> Harold Abelson et al, 'Keys Under Doormats: Mandating Insecurity by Requiring Government Access to All Data and Communications' (2015) 1(1) *Journal of Cybersecurity* 69; Reema Shah, 'Law Enforcement and Data Privacy: A Forward-Looking Approach' (2015) 125(2) *Yale Law Journal* 543; David E Sanger and Nicole Perlroth, 'Encrypted Messaging Apps Face New Scrutiny Over Possible Role in Paris Attacks', *The New York Times* (online, 16 November 2015) <<https://www.nytimes.com/2015/11/17/world/europe/encrypted-messaging-apps-face-new-scrutiny-over-possible-role-in-paris-attacks.html>>; Kristin Finklea, Congressional Research Service, *Encryption and Evolving Technology: Implications for US Law Enforcement Investigations* (Report, 18 February 2016) <<https://fas.org/sgp/crs/misc/R44187.pdf>>.

demand for greater communications security.<sup>2</sup> The benefits of encrypted messaging are the creation of a space where free-minded citizens might purchase or sell goods or engage freely in political or emotive discourse without the overarching threat of surveillance from the state.<sup>3</sup> But it also offers a dark side: a hidden marketplace where both buyer and seller are protected from identification, reprisal or arrest.<sup>4</sup> The criminal law response to encryption is difficult and involves a balancing act, as 'the power of ciphers protects citizens when they read, bank and shop online — and the power of ciphers protects foreign spies, terrorists and criminals when they pry, plot and steal'.<sup>5</sup>

This article intends to deal with the amendments encapsulated in the Bill. It identifies and codifies the issues, individual and systemic, which remain unanswered even on the passing of the legislation by the Australian Parliament. It then reflects upon a new concept — the 'disruption calculus' — to demonstrate that the proposed laws are likely to miss their target because of the nature of the disruption they are seeking to address, and the narrow method of regulatory intervention the government has chosen to implement. Like the Australian Government's approach to interception of metadata, the encryption laws are not future-proof.<sup>6</sup> The article closes with a comparison of Australia's approach to regulating encryption with that of Israel, a country not only considered a world leader in market and social methodologies of regulation, but also a 'living lab' for counterterrorism policy where 'entrepreneurism flourishes amidst perpetual internal and external national security threats and the extensive associated surveillance needs'.<sup>7</sup>

## II CONTEXTUAL INFORMATION

Communication platforms which employ end-to-end encryption permit users to exchange short messages in a similar fashion to text or SMS messages, without

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<sup>2</sup> Ksenia Ermoshina, Francesca Musiani and Harry Halpin, 'End-To-End Encrypted Messaging Protocols: An Overview' in Franco Bagnoli et al (eds), *Internet Science: Third International Conference, INSCI 2016, Florence, Italy, September 12–14, 2016, Proceedings* (Springer International Publishing, 2016) 244.

<sup>3</sup> Daniel Moore and Thomas Rid, 'Cryptopolitik and the Darknet' (2016) 58(1) *Global Politics and Strategy* 7.

<sup>4</sup> Judith Aldridge and David Décary-Héту, 'Not an "Ebay for Drugs": The Cryptomarket "Silk Road" as a Paradigm Shifting Criminal Innovation' [2014] *Social Science Research Network* 1 <<http://dx.doi.org/10.2139/ssrn.2436643>>.

<sup>5</sup> Moore and Rid (n 3) 9.

<sup>6</sup> Rick Sarre, 'Revisiting Metadata Retention in Light of the Government's Push for New Powers', *The Conversation* (online, 8 June 2018) <<https://theconversation.com/revisiting-metadata-retention-in-light-of-the-governments-push-for-new-powers-97931>>.

<sup>7</sup> Matthew Waxman and Doron Hindin, 'How Does Israel Regulate Encryption', *Lawfare* (Blog Post, 30 November 2015) <<https://www.lawfareblog.com/how-does-israel-regulate-encryption>>.

incurring the costs associated with an SMS exchange. Yet the development of such applications has been far more disruptive to law enforcement; in many cases, not even the company is able to decrypt its own messages. In response to a subpoena received in late 2014 as part of a drug trafficking investigation, WhatsApp allegedly replied: ‘WhatsApp cannot provide information we do not have’.<sup>8</sup>

Australia also has some of its own experience on this front. Phantom Secure, a Canada-based developer of smartphone software, marketed its products in 2015 and 2016 as specifically designed to protect against interception by both government and corporate agents. Studies of the devices quickly determined that the encryption methodologies were of significant attraction to organised crime groups.<sup>9</sup> The Australian Federal Police (‘AFP’) were subsequently involved in a major international investigation which saw Phantom Secure’s CEO Vincent Ramos indicted on racketeering and conspiracy charges, immediately before the United States’ Federal Bureau of Investigation (‘FBI’), AFP and Royal Canadian Mounted Police officers seized thousands of phones during raids across the three countries.<sup>10</sup>

Much of the Australian jurisprudential experience has come by way of dealing with terrorism offences.<sup>11</sup> In *R v Besim*, an 18-year-old was convicted of planning a terrorist act.<sup>12</sup> The accused had allegedly planned to crash into a police officer with a car and then behead him — plans which he shared via Telegram with a 14-year-old known by the pseudonym ‘S’. These discussions were only discovered when police in the United Kingdom arrested S on unrelated matters and identified the information on his phone. In one of the judgments in *R v Khaja*, the use of an encrypted messaging service to communicate the accused’s plans was held to be a circumstance increasing the seriousness of the offence.<sup>13</sup> Lastly in *R v MHK*, the Commonwealth Director of Public Prosecutions appealed a sentence of seven years imposed on an offender who, at the age of 17, pleaded guilty to planning a terrorist act. The Court of Appeal increased the sentence from seven to 11 years, noting that the offender used

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<sup>8</sup> Matt Apuzzo, ‘WhatsApp Encryption Said to Stymie Wiretap Order’, *The New York Times* (online, 12 March 2016) <<https://www.nytimes.com/2016/03/13/us/politics/whatsapp-encryption-said-to-stymie-wiretap-order.html>>. See Shah (n 1).

<sup>9</sup> Matteo Vergani and Sean Collins, ‘Radical Criminals in the Grey Area: A Comparative Study of Mexican Religious Drug Cartels and Australian Outlaw Motorcycle Gangs’ (2015) 38(6) *Studies in Conflict & Terrorism* 414; Rick Sarre, ‘Metadata Retention as a Means of Combatting Terrorism and Organised Crime: A Perspective from Australia’ (2017) 12(3) *Asian Journal of Criminology* 167. See also *Re McNally* [2018] VSC 522.

<sup>10</sup> Lucy McNally and John Stewart, ‘Australian Federal Police Seize Phantom Secure Phones as Part of Global Crackdown’, *ABC News* (online, 16 March 2018) <<https://www.abc.net.au/news/2018-03-16/afp-seize-phones-as-part-of-phantom-secure-crackdown/9555652>>.

<sup>11</sup> See, eg, *R v Elomar* (2010) 264 ALR 759; *Benbrika v The Queen* (2010) 29 VR 593; *R v Khalid* [2017] NSWSC 1365.

<sup>12</sup> *R v Besim* [2016] VSC 537.

<sup>13</sup> *R v Khaja* [No 5] [2018] NSWSC 238.

encrypted messaging software as one of 'a variety of deceptions' designed to keep his preparations secret from close members of his family.<sup>14</sup>

In Australia, end-to-end encryption transcripts have only been used as evidence in the last five years,<sup>15</sup> but it is important to note that, in all these cases, transcripts were provided either by a party to the conversations or from police who had forensically extracted the data from a mobile phone. No Australian case has yet dealt with the possibility of intercepted end-to-end data or forensically decrypted messages.<sup>16</sup>

### III THE AUSTRALIAN ENCRYPTION LAWS

The concept of everyday access to encrypted methodologies being used to hide widespread criminality and illegality (otherwise known as 'going dark') is considered one of the greatest threats facing law enforcement and national security agencies in the 21<sup>st</sup> century.<sup>17</sup>

Telecommunications interception and access has been a feature of Australia's legal landscape since at least the 1970s, when the *Telecommunications (Interception and Access) Act 1979* (Cth) ('*Telecommunications Act 1979*') first came into being. The *Telecommunications Act 1979* permits certain agencies various degrees of access to telecommunications data, with increasing levels of scrutiny over such access. Generally speaking, three levels of access are permitted:

- a) Access to existing information or documents: this includes details about what inbound and outbound telephone calls or SMSes a particular service makes during a given period, but more recently has also included access to metadata. These require an authorisation under pt 4-1 of the *Telecommunications Act 1979*, signed by an 'authorised officer', with a limited list of law enforcement agencies also permitted access.<sup>18</sup>

<sup>14</sup> *DPP (Cth) v MHK (a Pseudonym)* (2017) 52 VR 272, 291 [63].

<sup>15</sup> *R v Al-Kutobi* [2016] NSWSC 1760; *DPP (Cth) v Satharupan* [2016] VCC 1783. See also the Fair Work Commission's treatment on appeal in *Wong v Taitung Australia Pty Ltd* (2017) 268 IR 145.

<sup>16</sup> The closest so far appears to be *DPP v Tran* [2016] VCC 77, which appears to involve a mixture of surveillance, telecommunications interception warrants and forensic analysis.

<sup>17</sup> James A Lewis, Denise E Zheng and William A Carter, Center for Strategic and International Studies, *The Effect of Encryption on Lawful Access to Communications and Data* (Report, February 2017) 12–17; Hoaithi YT Nguyen, *Lawful Hacking: Towards a Middle-Ground Solution to the Going Dark Problem* (MA Thesis, Naval Postgraduate School, 2017).

<sup>18</sup> Including delegates of a law enforcement agency as defined by the *Telecommunications (Interception and Access) Act 1979* (Cth) s 5AB(1).

- b) Access to stored communications: this might include stored emails, SMSes or actual content of communications passing over or through a particular communications service during a given period. Stored communications require the issue of a stored communications warrant under pt 3-3 of the *Telecommunications Act 1979*, which can only be issued by an issuing authority.<sup>19</sup>
- c) Access to install and monitor interception technology: generally these cover various telephone, internet and email interception technologies (also known as ‘wiretaps’), where the communication between two parties is listened to or observed by a law enforcement agency. Again, a warrant must be issued under Pts 2-2 and 2-5 of the *Telecommunications Act 1979*, and again are limited to police, select law enforcement agencies and the Australian Security Intelligence Organisation (‘ASIO’).

All of these various authorisations and warrants are monitored by the Commonwealth Ombudsman as an oversight mechanism, with additional layers of protection for journalists. Division 4C of pt 4-1 requires the ASIO or a ‘law enforcement agency’ to apply to the Attorney-General for a warrant if they seek records related to a person the agency reasonably believes is a journalist. A ‘Public Interest Advocate’ is also involved in this process to make submissions to the Attorney-General about the scope of the proposed journalist information warrant.<sup>20</sup>

The Australian Government has thus moved relatively swiftly to address the disconnect between its law enforcement agencies and encryption technology. In July 2017, it signalled its intention to address the issue with the passing of legislation that would target the corporate sector to cooperate with law enforcement, by coercion if necessary.<sup>21</sup> In August 2018, Australia met with the other Five Eyes nations<sup>22</sup> where a joint position was reached on the importance of the primacy of the rule of law and due process protections, as a balance between a citizen’s right to privacy and the legitimate public interest in enforcement of the criminal law.<sup>23</sup> On 20 September 2018, proposed amendments were introduced into the House of Representatives. These amendments contained a number of changes to Australian surveillance law:

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<sup>19</sup> Usually a judicial or tribunal officer: *ibid* s 6DB.

<sup>20</sup> *Ibid* s 180X.

<sup>21</sup> Malcom Turnbull, ‘Press Conference with Attorney-General and Acting Commissioner of the AFP — Sydney — 14 July 2017’ (Press Conference, 14 July 2017) <<https://www.malcolmturnbull.com.au/media/press-conference-with-attorney-general-and-acting-commissioner-of-the-afp-s>>.

<sup>22</sup> The Five Eyes Alliance is an intelligence-sharing alliance established under the UKUSA Agreement between Canada, New Zealand, the United Kingdom, the United States of America and Australia. The alliance is designed to facilitate the timely and free sharing of intelligence and national security information.

<sup>23</sup> Attorney-General’s Department, ‘Statement of Principles on Access to Evidence and Encryption’ (Media Release, 30 August 2018) <<https://www.attorneygeneral.gov.au/Media/Documents/joint-statement-principles-access-evidence.pdf>>.

- a) Schedule 1 amends the *Telecommunications Act 1997* (Cth) to insert a new 'Part 15 — Industry assistance', which contains certain requirements for industry to assist law enforcement and national security agencies to decrypt communications.
- b) Schedule 2 amends the *Australian Security Intelligence Organisation Act 1979* (Cth) ('*ASIO Act*') to expand powers already present with respect to computer access warrants and authorisations executed by ASIO under the *Surveillance Devices Act 2004* ('*SD Act*').
- c) Schedule 3 amends the *Crimes Act 1914* (Cth) to expand police powers under search warrant provisions to compel the production of passwords and assistance to access a device which may hold evidentiary material, subject to an assistance order, and to access data remotely during the valid period of the warrant.
- d) Schedule 4 broadens the search warrants powers under the *Customs Act 1901* (Cth) to permit the Australian Border Force to seek assistance orders similar to those in the *Crimes Act 1914* (Cth).
- e) Schedule 5 amends the *ASIO Act* to introduce provisions for the ability of ASIO officers to require certain assistance in relation to its execution of a warrant authorised under existing provisions.

It is important to note that the amendments offer the new pt 15 powers only to defined 'interception agencies', being the Police Forces of the states and territories, the AFP and Australian Crime Commission, ASIO, the Australian Secret Intelligence Service, and the Australian Signals Directorate.<sup>24</sup> This is hardly surprising, given that these are also the agencies that already have a specific ability to apply for existing telecommunications interception and data access warrants under the *Telecommunications Act 1997* (Cth).

Pt 15 introduces a tiered approach to assistance requirements, with non-compliance forming the basis for civil liability and penalties of up to \$10 million:

- a) A 'technical assistance request' ('TAR') under div 2, which is a voluntary request to provide assistance that might facilitate the agency undertaking its investigative work, such as removing electronic protection, providing technical information, installing software, putting information in a given format and facilitating access to devices or services.<sup>25</sup>

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<sup>24</sup> *Telecommunications Act 1997* (Cth) s 317B. State and Territory interception forces must notify and seek the approval of the AFP Commissioner before issuing any Notice under pt 15: at s 317LA.

<sup>25</sup> *Ibid* s 317E. Electronic protection includes both authentication and encryption measures: at s 317B.

- b) A ‘technical assistance notice’ (‘TAN’) under div 3, which compels a service provider to assist the agency in a way that is both practicable and technically feasible.<sup>26</sup>
- c) A ‘technical capability notice’ (‘TCN’) under div 4 issued by the Attorney-General (with the approval of the Home Affairs Minister), which requires that a service provider build an inherent capability into their systems or infrastructure that would enable ASIO or an interception agency to undertake their functions.

Yet Australia’s proposal is still considered unique amongst the Five Eyes nations, as it goes a step further than the existing ‘industry assistance’ provisions in the United Kingdom and New Zealand law. The New Zealand legislation imposes general duties on network operators to provide ‘access points’ and ‘delivery ports’ (as well as housings and staff to support interception equipment) to enable interception agencies to lawfully intercept communications passing over the networks those operators provide.<sup>27</sup>

The United Kingdom legislation permits a wide variety of interception warrants to be issued for equipment interference (covering conduct that would be analogous to ‘wiretaps’ or pt 2-2 or pt 2-5 warrants) but places the oversight of interception warrants and notices under the aegis of the Investigatory Powers Commissioner, Judicial Commissioners and/or the Secretary of State. TCNs under the *Investigatory Powers Act 2016* (UK) require consultation by the Secretary of State with the person who will be affected by its issue about, inter alia, the technical feasibility and cost of complying with the TCN.<sup>28</sup>

Australia’s language around TCNs is considered a world first, even amongst other Five Eyes nations. Whilst New Zealand law imposes duties on telecommunications providers, it does so in general terms about developing the capability to intercept (as opposed to decrypt) communications which pass over their networks. Even the United Kingdom (which already includes TCNs in their legal framework) these provisions stop short of requiring that a given technology provider actively provide a potential ‘back door’ into their systems that would assist interception agencies — which is what the Australian TCN contemplates. The following is a brief comparison of some of the relevant provisions in Australian and UK law:

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<sup>26</sup> Ibid s 317P.

<sup>27</sup> Without specifically proscribing a decryption capability: *Telecommunications (Interception Capability and Security) Act 2013* (NZ) ss 9–11.

<sup>28</sup> *Investigatory Powers Act 2016* (UK) ss 15, 61, 99, 136, 158, 176, 252–7.

**Table 1: Brief comparison of Australian and United Kingdom legislation on TCNs**

<i>Telecommunications Act 1997 (Cth)</i>	<i>Investigatory Powers Act 2016 (UK)</i>
A TCN is a notice that requires the provider to perform one or more specified acts 'directed towards ensuring that the designated communications provider is capable of giving listed help to ASIO, or an interception agency, in relation to the performance of a function, or the exercise of a power, conferred by or under a law of the Commonwealth, a State or a Territory, <i>so far as the function or power relates to a relevant objective</i> ' (s 317T(2)(a)(i)).	A TCN is a notice imposing on the relevant operator any applicable obligations relating to 'the removal by a relevant operator of <i>electronic protection applied by or on behalf of that operator</i> to any communications or data ... obligations relating to the security of any postal or telecommunications services provided by a relevant operator' (s 253(5)).

The draft Bill introduced into the House of Representatives on 20 September 2018 was referred to the Parliamentary Joint Committee on Intelligence and Security ('PJCIS') for inquiry, with a report published in early December 2018. The Bill passed both Houses on 6 December 2018. The Bill was also reviewed by the Parliamentary Standing Committee for the Scrutiny of Bills.<sup>29</sup> Whilst a full analysis of the Standing Committee's findings is beyond the scope of this article, that Committee raised additional concerns regarding the potential unconstitutional nature of excluding ADJR review of notices,<sup>30</sup> the blurring of the separation of powers doctrine,<sup>31</sup> as well as incompatibility with the Attorney-General's own policy guidance.<sup>32</sup>

#### IV RESPONSE TO THE BILL'S PROPOSALS

The exposure draft of the legislation was released on 14 August 2018. Over 340 submissions were received by the Department of Home Affairs during this initial exposure draft, which the Department claimed 'was productive and led to significant amendments to the Bill to address key concerns raised and reinforce the policy intent of the Bill'.<sup>33</sup> The Bill was referred to the PJCIS on 20 September 2018, who

<sup>29</sup> Parliamentary Standing Committee for the Scrutiny of Bills, Parliament of Australia, *Scrutiny Digest* (Digest No 14 of 2018, 28 November 2018) 23–82 ('*Scrutiny Digest*').

<sup>30</sup> Under the provisions of the *Administrative Decisions (Judicial Review) Act 1977* (Cth) ('ADJR').

<sup>31</sup> Where officers of the administrative branch of government could offer civil immunity to designated communication providers to comply with pt 15 notices.

<sup>32</sup> Attorney-General's Department, *A Guide to Framing Commonwealth Offences, Infringement Notices and Enforcement Powers* (Guide, September 2011) 50–2; cf *Telecommunications Act 1997* (Cth) s 317ZF(1).

<sup>33</sup> Department of Home Affairs, Submission No 18 to PJCIS, *Review of the Telecommunications and Other Legislation Amendment (Assistance and Access) Bill 2018* (2018) 42.

held public hearings from 19 October to 30 November 2018, and also invited further submissions. In total (including confidential and withheld submissions) 105 submissions were received:

**Table 2: Broad classes of persons making submissions to the PJCIS**

Party	Number of Submissions
Telecommunication providers	8
Members of Parliament	3
Non-Governmental Organisations	26
Police or Crime Commissions	5
Members of the public	39
Name Withheld	11
Confidential	6
United Nations Special Rapporteur	1
Government agencies (Office of the Australian Information Commissioner, Commonwealth Ombudsman, Inspector-General of Intelligence and Security)	6

The responses to the proposals were unsurprisingly partisan. The submission of the Department of Home Affairs reflected on the ‘extensive two-stage consultation’ engaged in by the drafters of the legislation as well as between the responsible Ministers.<sup>34</sup> The Independent Commission Against Corruption (NSW), Law Enforcement Conduct Commission, Queensland Police Service, and Police Federation of Australia all supported the Bill without amendment (Victoria Police who, while supporting the Bill, lamented that they would not have access to the Bill’s powers for their own investigations).<sup>35</sup> The Minister himself also provided a submission seeking ‘accelerated’ consideration of the legislation.<sup>36</sup> The Commonwealth Ombudsman was cautiously neutral, accepting that their oversight role under the proposed

<sup>34</sup> Ibid 42.

<sup>35</sup> Police Federation of Australia, Submission No 36 to PJCIS, *Review of the Telecommunications and Other Legislation Amendment (Assistance and Access) Bill 2018* (12 October 2018); Law Enforcement Conduct Commission, Submission No 57 to PJCIS, *Review of the Telecommunications and Other Legislation Amendment (Assistance and Access) Bill 2018* (2018); Independent Commission Against Corruption, Submission No 75 to PJCIS, *Review of the Telecommunications and Other Legislation Amendment (Assistance and Access) Bill 2018* (17 October 2018); Queensland Police, Submission No 97 to PJCIS, *Review of the Telecommunications and Other Legislation Amendment (Assistance and Access) Bill 2018* (2018); Victoria Police, Submission No 98 to PJCIS, *Review of the Telecommunications and Other Legislation Amendment (Assistance and Access) Bill 2018* (30 November 2018).

<sup>36</sup> Peter Dutton, Submission No 89 to PJCIS, *Review of the Telecommunications and Other Legislation Amendment (Assistance and Access) Bill 2018* (22 November 2018).

framework was likely to lead to an expansion of the Ombudsman's role and would require additional resourcing.<sup>37</sup>

Unfortunately, there was far more opposition (at least in numbers of submissions) from representatives of Australia's information technology, computer security and telecommunication providers. Key criticisms were the lack of consultation, lack of specific definitions, extraterritorial nature of the Bill and erosion of trust likely to occur between telecommunications providers and their consumers.<sup>38</sup> Other specific examples of opposition included:

- a) Optus strongly suggested a mandated consultation step to identify costs and capability concerns as well as permitting options for voluntary compliance (other than by TAR) to minimise the costs of introducing new capabilities.<sup>39</sup>
- b) Telstra went a step further, suggesting TANs should not 'require development or implementation of a technical capability the relevant [provider] does not have'.<sup>40</sup>
- a) Mozilla described their concerns around the increased international tensions inherent in the sale of 'compromised software' in jurisdictions other than Australia.<sup>41</sup>
- b) Cisco specifically cited their disclosure obligations and security policy to the public on 'bugs' and how this interacted with TANs and TCNs.<sup>42</sup>

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<sup>37</sup> Commonwealth Ombudsman, Submission No 64 to PJCIS, *Review of the Telecommunications and Other Legislation Amendment (Assistance and Access) Bill 2018* (15 October 2018).

<sup>38</sup> Australian Computer Society, Submission No 1 to PJCIS, *Review of the Telecommunications and Other Legislation Amendment (Assistance and Access) Bill 2018* (25 September 2018) 2; Kaspersky Lab, Submission No 13 to PJCIS, *Review of the Telecommunications and Other Legislation Amendment (Assistance and Access) Bill 2018* (2018); Coalition of Civil Society Organisations & Technology Companies and Trade Associations, Submission No 29 to PJCIS, *Review of the Telecommunications and Other Legislation Amendment (Assistance and Access) Bill 2018* (21 November 2018).

<sup>39</sup> Optus, Submission No 41 to PJCIS, *Review of the Telecommunications and Other Legislation Amendment (Assistance and Access) Bill 2018* (October 2018) 2–3.

<sup>40</sup> Telstra, Submission No 44 to PJCIS, *Review of the Telecommunications and Other Legislation Amendment (Assistance and Access) Bill 2018* (12 October 2018) 5 [2.2].

<sup>41</sup> Mozilla, Submission No 46 to PJCIS, *Review of the Telecommunications and Other Legislation Amendment (Assistance and Access) Bill 2018* (12 October 2018) 3–4.

<sup>42</sup> Cisco, Submission No 42 to PJCIS, *Review of the Telecommunications and Other Legislation Amendment (Assistance and Access) Bill 2018* (12 October 2018) 5–7, 9.

- c) Senetas suggested Australia's international reputation in cyber security R&D would be damaged (with flow-on effects on exports). In addition, poor testing of vulnerabilities could result in unforeseen consequences such as mass outages.<sup>43</sup>

Dr Riana Pfefferkorn, Cryptography Fellow for the Stanford Center for Internet and Society, was far less restrained in her view of the legislation:

Simply put, the Bill would create a freight train without any brakes ... It will do nothing to prevent the Australian Government from undermining the security — and privacy, economic interests, even personal safety — not only of millions of Australians, but of covered entities' other users around the world.

I urge the Committee not to let this dangerous and misguided Bill proceed.<sup>44</sup>

There were even voices of caution amongst Members of Parliament and other government agencies, who expressed their concerns that the Bill impermissibly infringed the human rights of all Australians.<sup>45</sup> Even the Inspector-General of Intelligence and Security expressed her reservations about having a proposed oversight role and the technical challenges of modern encryption.<sup>46</sup>

Perhaps the most compelling submission came from Joseph Cannataci, the United Nations Special Rapporteur on the Right to Privacy in the Digital Age. The mandate of Cannataci's appointment includes 'challenges in relation to the right to privacy and to make recommendations to ensure its promotion and protection, including in connection with the challenges arising from new technologies'.<sup>47</sup> His submission to the PJCIS was a direct letter to both the Minister for Foreign Affairs and Minister for Home Affairs:

[The Bill] is an example of a poorly conceived national security measure that is equally as likely to endanger security as not; it is technologically questionable if it can achieve its aims and avoid introducing vulnerabilities to the cybersecurity

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<sup>43</sup> Senetas, Submission No 85 to PJCIS, *Review of the Telecommunications and Other Legislation Amendment (Assistance and Access) Bill 2018* (2018) 1.

<sup>44</sup> Riana Pfefferkorn, Submission No 35 to PJCIS, *Review of the Telecommunications and Other Legislation Amendment (Assistance and Access) Bill 2018* (11 October 2018) 3.

<sup>45</sup> Australian Human Rights Commission, Submission No 47 to PJCIS, *Review of the Telecommunications and Other Legislation Amendment (Assistance and Access) Bill 2018* (12 October 2018); Office of the Australian Information Commissioner, Submission No 65 to PJCIS, *Review of the Telecommunications and Other Legislation Amendment (Assistance and Access) Bill 2018* (15 October 2018).

<sup>46</sup> Inspector-General of Intelligence and Security, Submission No 52 to PJCIS, *Review of the Telecommunications and Other Legislation Amendment (Assistance and Access) Bill 2018* (12 October 2018).

<sup>47</sup> Human Rights Council, *The Right to Privacy in the Digital Age*, 28<sup>th</sup> sess, Agenda Item 3, UN Doc A/HRC/RES/28/16 (1 April 2015) 3.

of all devices irrespective of whether they are mobiles, tablets, watches, cars, etc., and it unduly undermines human rights including the right to privacy. It is out of step with international rulings raising the related issue of how the Australian Government would enforce this law on transnational technology companies.<sup>48</sup>

A theme emerges from Cannataci's submission that despite the threat of encrypted messaging to law enforcement, it 'is not yet significant enough to justify decryption mandates'.<sup>49</sup> He also cited the lack of judicial oversight of pt 15 notices,<sup>50</sup> definitional issues, and the lack of consultation with industry as fatal points in the legislation. Given that Australia lacks superior legal protections for privacy such as a Bill of Rights or constitutional right to privacy, he also expressed concerns that Australia's proposal was out of lockstep even with other Five Eyes nations, and would inevitably follow the experiences of the United Kingdom and European governments in this area.<sup>51</sup>

Yet despite the many submissions and committee reports relating to the proposed amendments, the PJCIS made only modest recommendations. The Bill was amended to clarify certain definitions and inserted provisions for a service provider to be consulted and obtain advice about compliance with a TCN.<sup>52</sup> Provisions relating to TANs and TARs were also amended to ensure they could not be used to circumvent existing processes for which a warrant was already required.<sup>53</sup> Despite Labor members of the PJCIS having considered the Bill, a number of concerns remained.<sup>54</sup> The Bill received Royal Assent on 8 December 2018 and is now part of Australian law.<sup>55</sup> A further inquiry by the PJCIS is now underway and a separate statutory review by the Independent National Security Legislation Monitor is due within 12 months of the legislation coming into effect. Yet there remain some substantial problems with the proposed regulatory framework the Commonwealth has imposed.

<sup>48</sup> Joseph Cannataci, Submission No 81 to PJCIS, *Review of the Telecommunications and Other Legislation Amendment (Assistance and Access) Bill 2018* (12 October 2018) 4.

<sup>49</sup> Lewis, Zheng and Carter (n 17).

<sup>50</sup> Cf *Investigatory Powers Act 2016* (UK) ss 252–8.

<sup>51</sup> Such as the findings of the European Court of Human Rights: *Big Brother Watch v the United Kingdom* (European Court of Human Rights, Grand Chamber, Applications Nos 58170/13, 62322/14 and 24960/15, 13 September 2018) ('*Big Brother Watch*').

<sup>52</sup> PJCIS, Parliament of Australia, *Advisory Report on the Telecommunications and Other Legislation Amendment (Assistance and Access) Bill 2018* (Report, December 2018) 5–7 ('PJCIS report').

<sup>53</sup> *Telecommunications Act 1997* (Cth) s 317ZH.

<sup>54</sup> Such as in the definitions for systemic vulnerability and weakness, target technology, imposition of relevant objectives for the issue of pt 15 notices as well as a process for State and Territory interception agencies to apply to the AFP Commissioner for such notices.

<sup>55</sup> For this reason, from hereon any references to the *Telecommunications Act 1997* (Cth) are references to that Act, as amended.

## V PROBLEMS OF SCOPE AND SCALE

One of the most valid criticisms raised by the opponents to the Bill was its inconsistency with Australia's international law obligations. The provisions in the *Investigatory Powers Act 2016* (UK), on which the Bill was modelled, were struck down by the European Court of Human Rights<sup>56</sup> for violating arts 8 and 10 of the *European Convention on Human Rights*,<sup>57</sup> as were similar data retention provisions in EU member states.<sup>58</sup> Although Australia is not bound by the European Convention, the Convention shares several similarities with the *Universal Declaration of Human Rights*<sup>59</sup> and Australia's Human Rights Framework.<sup>60</sup> It is strongly arguable that the Bill could likewise offend provisions around 'security of person' (art 3), right to legal review (art 10) and arbitrary interferences with privacy (art 12). This hypothesis is buttressed by the findings of the Parliamentary Joint Committee on Human Rights who made similar comments in their report.<sup>61</sup> In effect, they found that the Bill imposed significant restrictions on Australia's human rights obligations because most of the considerations for pt 15 are conducted in camera and ex parte, and are not subject to applications for judicial review.

Moving to matters of domestic law, the Bill was vague on specifying the offences to which it would apply. The initial draft of the Bill sought to permit the intrusion of the interception and national security agencies for *any* matter falling under their purview. Following the hearing of evidence at both public hearings and written submission stages, the PJCIS recommended that the criminal law enforcement provisions of the *Telecommunications Act 1997* amendments be restricted to the investigation of offences with a maximum penalty of at least three years imprisonment.<sup>62</sup> A similar distinction was suggested by the Parliamentary Standing Committee for the Scrutiny of Bills.<sup>63</sup> Whilst this might seem like an appropriate distinction to remove the majority of simple or summary offences, the time period looks arbitrary when considering that investigation of the following offences would be sufficient

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<sup>56</sup> *Big Brother Watch* (n 51).

<sup>57</sup> *Convention for the Protection of Human Rights and Fundamental Freedoms*, opened for signature 4 November 1950, 213 UNTS 222 (entered into force 3 September 1953), as amended by *Protocol No 14 to the Convention for the Protection of Human Rights and Fundamental Freedoms, Amending the Control System of the Convention*, opened for signature 13 May 2004, CETS No 194 (entered into force 1 June 2010) ('European Convention').

<sup>58</sup> Thomas Wahl and Cornelia Riehle, 'Focus: Anti-Money Laundering' [2016] (4) *European Criminal Law Associations Forum* 153, 164.

<sup>59</sup> *Universal Declaration of Human Rights*, GA Res 217 A (10 December 1948).

<sup>60</sup> Attorney-General's Department, *Australia's Human Rights Framework* (Framework, April 2010).

<sup>61</sup> Parliamentary Joint Committee on Human Rights, *Human Rights Scrutiny Report: Report 11 of 2018* (Report, 16 October 2018) 24–71; *Telecommunications Act 1997* (Cth) sch 1 pt 1.

<sup>62</sup> PJCIS report (n 52) 3 [2.3].

<sup>63</sup> *Scrutiny Digest* (n 29) 36–8.

ground for the issuing of a request or notice to vitiate encryption privacy under the proposed pt 15:

- a) Possessing, making, exhibiting or selling infringements of copyright;<sup>64</sup>
- b) Fishing in a Commonwealth marine area;<sup>65</sup> and
- c) Mail tampering, dishonestly dealing in personal financial information, and (ironically) possessing an interception device.<sup>66</sup>

Both TANs (issued by the head of an interception agency) and TCNs (issued by the Attorney-General) must also require assistance from a service provider that is 'reasonable and proportionate' as well as in terms that are 'practicable and technically feasible'.<sup>67</sup> Whilst Recommendation 11 in the PJCIS report<sup>68</sup> may have resulted in the inclusion of new sections to define (respectively) what is 'reasonable and proportionate' for the issue of TARs, TANs and TCNs, the legislation remains near-silent on the definition of 'practicable and technically feasible'.<sup>69</sup> There is some manoeuvrability for TCNs, as a TCN cannot be issued until a consultation notice has been issued and a provider has provided the Attorney-General with a submission on the grounds of that TCN. This submission may include expert assessment and reports on whether a systemic weakness or systemic vulnerability has been or could be introduced by two assessors.<sup>70</sup> TANs have no such provision. Deployment of any assistance or capability under a TAN or TCN which creates a systemic weakness or systemic vulnerability under s 317ZG also obviates liability for the provider.

But in the absence of a s 317W report for consultation with the Attorney-General, which entity determines what is 'practicable' and 'technically feasible'? Is it the service provider, the requesting agency, the courts, or the standards of society at large? Whilst there is some scope for a senior officer of the interception agency<sup>71</sup> to provide 'advice' on the scope of the service provider's obligations, there is no real extrinsic or independent assessment on the balance of the notice. To demonstrate the difficulty of answering these questions, let us consider a hypothetical scenario: ASIO wants to conduct a targeted installation of malware on several iPhones operated by

<sup>64</sup> *Copyright Act 1968* (Cth) ss 132AD–132AM.

<sup>65</sup> *Environment Protection and Biodiversity Conservation Act 1999* (Cth) s 390SB.

<sup>66</sup> *Criminal Code* (Cth) ss 471.7, 480.4 and 474.4 respectively.

<sup>67</sup> *Telecommunications Act 1997* (Cth) ss 317P, 317V.

<sup>68</sup> PJCIS report (n 52) 6.

<sup>69</sup> *Telecommunications Act 1997* (Cth) ss 317PA, 317RA, 317ZAA; these terms do provide some flexibility in their application, as what is practicable and technically feasible will always depend upon the circumstances.

<sup>70</sup> One of whom must be a former judge: *ibid* ss 317W, 317WA.

<sup>71</sup> Either the Director-General of Security or the chief officer of an interception agency, as appropriate: *ibid* ss 317MAA(1)–(2).

a suspected terrorist, whose details are known to the agency. ASIO might consider that the installation is both practicable and technically feasible, but Apple might disagree for reasons ASIO have not considered. Assisting law enforcement in this way might expose Apple to a heightened risk of terrorist attack themselves, lower their share price, cause them to lose opportunities with foreign investors or other nations' governments, or suffer reduced sales from consumers who do not want their privacy compromised. These considerations may not sway ASIO in issuing a TAN, but would certainly be part of Apple's consideration around compliance. Apple could risk incurring the civil penalty of Australia rather than breaching the European *General Data Protection Regulation*.<sup>72</sup>

Likewise, there are issues with the definition of systemic weaknesses and vulnerabilities. At what point is a weakness or vulnerability considered 'systemic'? The Bill failed to include the recommendations of the Director-General of the Australian Signals Directorate, who considered a 'systemic' weakness or vulnerability to be 'a weakness that 'might actually jeopardise the information of other people as a result of that action being taken'.<sup>73</sup> The Communications Alliance submission makes the problems with ambiguity in the Bill abundantly clear:

It is unclear at what point a requested weakness would become systemic, ie would a weakness be systemic when a certain system is involved or does the concept of systemic revolve around the number of users (potential or actual?) affected by the weakness and, if so, what would a relevant user number threshold be? It is also not clear how vendors of telecommunications network equipment could be required to do a SAT [specified act or thing] without introducing a systemic weakness or vulnerability given that their products are at the core of most digital communications. Similarly, it is not clear what a weakness or vulnerability would be in the eyes of the requesting agency.<sup>74</sup>

The overlap of the provisions and lack of clarity around important terms also raises a number of serious questions about the scope and scale of TANs and TCNs. The lack of requirement for ministerial involvement for the issue of a TAN seems like an appropriate scaling of compulsory power reposing in an investigative agency. However, the fact that a TAN is not subject to consultation and also lacks clarity around what constitutes 'practicable and technically feasible' assistance opens the door to potential for misuse or abuse, either by the interception agency or third parties. Consider our earlier scenario with an interception agency installing malware on several iPhones.

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<sup>72</sup> In which case it stands to be fined up to 4% of its annual turnover: Apple, Submission No 53 to the PJCIS, *Review of the Telecommunications and Other Legislation Amendment (Assistance and Access) Bill 2018* (2018) 5–7.

<sup>73</sup> PJCIS report (n 52) xi.

<sup>74</sup> Communications Alliance, Australian Information Industry Association and Australian Mobile Telecommunications, Submission to the Department of Home Affairs, *Telecommunications and Other Legislation Amendment (Assistance and Access) Bill 2018* [Exposure Draft] (7 September 2018) 12–13 ('Communications Alliance report').

Assuming the investigation relates to a sufficiently serious criminal offence, this approach does not involve the introduction of a 'systemic' weakness and also does not require a specific 'capability' to be built into a service provider's system, so could be grounds for the issue of a TAN. In fact, this specific example is cited in the Explanatory Memorandum:

The mere fact that a capability to selectively assist agencies with access to a target device exists will not necessarily mean that a systemic weakness has been built. The nature and scope of any weakness and vulnerability will turn on the circumstances in question and the degree to which malicious actors are able to exploit the changes required.<sup>75</sup>

There is the possibility that malware could be targeted by another interception agency without the need for a TAN (as they are exploiting a vulnerability already present in the software). There is no oversight of this activity, and in fact the sharing of information relating to TARs, TANs and TCNs is permitted between interception agencies,<sup>76</sup> meaning the AFP could learn of ASIO's installation of the malware and seek to exploit it themselves without being subject to the scrutiny of their Agency Head, the Inspector-General of Intelligence and Security or the Commonwealth Ombudsman.<sup>77</sup> The malware could also be exploited by another investigative agency not even covered by the protections and requirements of the Bill. In the most extreme case, ASIO, the body that has statutory responsibility for Australia's domestic security, could have facilitated access to that phone by a hacker, working alone or for the government of another nation.

## VI AUSTRALIAN REGULATORS AND TELECOMMUNICATIONS INTERCEPTION

The history of telecommunications interception in Australia is littered with such examples of law enforcement use gone wrong. At the end of each financial year the Attorney-General's Department publishes a report detailing the occasions when law enforcement agencies accessed telecommunications data under the *Telecommunications Act 1997*. Previous revisions of the *Telecommunications Act 1997* permitted access to any state, territory or federal agency with a role connected to the enforcement of the criminal law, or a law administering a pecuniary penalty — which rather elastically covered everything from murder and drug offences, to on-street parking and unregistered pets. In fact, the Department's 2014–15 Annual Report<sup>78</sup> listed that a host of various agencies had successfully accessed telecommunications data

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<sup>75</sup> Explanatory Memorandum, Telecommunications and Other Legislation Amendment (Assistance and Access) Bill 2018 (Cth) 67–8.

<sup>76</sup> *Telecommunications Act 1997* (Cth) ss 317ZF(6)–(12).

<sup>77</sup> *Ibid* s 317TAB.

<sup>78</sup> Attorney-General's Department, *Telecommunications (Interception and Access) Act 1979 Annual Report 2014–15* (Report, 2011).

1,116 times in the enforcement of a criminal law,<sup>79</sup> and 2,197 times in the enforcement of a law administering a pecuniary penalty or protecting public revenue.<sup>80</sup>

These agencies included various local councils, liquor regulators, racing and wagering bodies, and the RSPCA. The highest number of authorisations was from the New South Wales Office of Fair Trading, who with 675 authorisations for 2014–15 exceeded the requests of several of the dedicated anti-corruption commissions including NSW's Independent Commission Against Corruption and Victoria's Independent Broad-Based Anti-Corruption Commission.

One recommendation from the 2012 inquiry was the reduction in agencies able to access telecommunications data by using a 'gravity of conduct' test, where serious crime and threats to security were of higher importance than non-criminal matters.<sup>81</sup> A subsequent inquiry was commenced following the introduction of the proposed Telecommunications (Interception and Access) Amendment (Data Retention) Bill 2014. Recommendations 17 to 28 of that Inquiry related to tightening the safeguards around access to telecommunications data, limiting it only to 'enforcement agencies' declared by primary legislation or regulation.<sup>82</sup> When these provisions came into effect on 13 October 2015, it reduced the number of agencies permitted to make telecommunications data requests from 63 to only 20.<sup>83</sup> In a case of circumstances going full circle, the recent PJCIS enquiry into the Bill has heard that s 313 of the *Telecommunications Act 1997* is now being used by a whole variety of agencies including fisheries, workplace health and safety, local councils, and the racing and taxi integrity bodies to circumvent the metadata restrictions imposed in 2014 and obtain information that the 2014 amendments intended to make subject to a warrant.<sup>84</sup>

Another example which resulted in embarrassment throughout the government was the approach to content blocking (also called 'blacklisting'). The approach seems relatively straightforward — block specific IP address ranges from connecting to domestic browsers, or blocking webpages based on specific keywords. But the devil is in the detail. Many Australian regulators rely on s 313(3) of the *Telecommunications Act 1997* to block access to offensive material, by relying on the provision for providers to render law enforcement with 'reasonably necessary' assistance. Subsection 313(3) permits (although with vague and imprecise language) Australian law enforcement to block illicit websites and thereby 'prevent and disrupt activity

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<sup>79</sup> Ibid 44.

<sup>80</sup> Ibid 47.

<sup>81</sup> PJCIS, Parliament of Australia, *Report of the Inquiry into Potential Reforms of Australia's National Security Legislation* (Report, May 2013) 25–6.

<sup>82</sup> PJCIS, Parliament of Australia, *Advisory Report on the Telecommunications (Interception and Access) Amendment (Data Retention) Bill 2014* (Report, February 2015) xvii–xxii.

<sup>83</sup> Attorney-General's Department, *Telecommunications (Interception and Access) Act 1979 Annual Report 2015–16* (Report, 2015) vii.

<sup>84</sup> Evidence to PJCIS, Parliament of Australia, Canberra, 19 October 2018, 41 (John Stanton).

which may cause serious harm to the Australian community'.<sup>85</sup> But in April 2013, ASIC inadvertently blocked several webpages of the Melbourne Free University when trying to target a serial fraudster.<sup>86</sup> The result (perhaps unsurprisingly) was a Senate inquiry which produced a report scathing in its criticism of the 'inability of the agency to correctly target the offending websites without causing collateral damage, and the time delay in identifying the problem'.<sup>87</sup>

Both definitional and targeting problems abound throughout the Bill. The breadth of 'designated service provider' in the Bill is particularly problematic. Whilst clearly meant to capture large corporate actors such as Facebook, Telstra and Google and make them subject to the issue of pt 15 notices, the definition is equally capable of capturing the assistance rendered by a single individual, such as a line technician or retailer. Whilst the Explanatory Memorandum couches the definition as being in 'technologically neutral language to allow for new types of entities and technologies to fall within its scope as the communications industry evolves', it also permits a degree of legislative creep over the powers available to interception agencies. In their submission to the PJCIS, the Communications Alliance raised concerns that TARs and TANs could be issued 'anywhere in the supply chain'.<sup>88</sup> The Australian Industry Group, Internet Architecture Board and Massachusetts Institute of Technology's Internet Policy Research Initiative collectively expressed grave concerns with the seemingly limitless number of entities that could be compelled to comply with pt 15 notices.<sup>89</sup>

Other hypothetical scenarios demonstrate the potential problems with the legislation. What happens if the introduction of a vulnerability, not in itself a 'systemic weakness' or 'systemic vulnerability', permits some incidental knowledge of a corporation's software to be divulged that could be exploited by a third party? Suppose that we take our previous scenario and assume that several iPhones contain a specific

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<sup>85</sup> Australian Federal Police, Submission No 20 to Standing Committee on Infrastructure and Communications, *Inquiry into the Use of Subsection 313(3) of the Telecommunications Act 1997 by Government Agencies to Disrupt the Operation of Illegal Online Services* (18 March 2015) 1.

<sup>86</sup> House of Representatives Standing Committee on Infrastructure and Communications, Parliament of Australia, *Balancing Freedom and Protection: Inquiry into the Use of Subsection 313(3) of the Telecommunications Act 1997 by Government Agencies to Disrupt the Operation of Illegal Online Services* (Report, June 2015) 10–13.

<sup>87</sup> *Ibid* 21 [2.55].

<sup>88</sup> Communications Alliance report (n 74) 11 [2.4].

<sup>89</sup> Australian Industry Group, Submission No 3 to PJCIS, *Review of the Telecommunications and Other Legislation Amendment (Assistance and Access) Bill 2018* (10 September 2018); Internet Architecture Board, Submission No 23 to PJCIS, *Review of the Telecommunications and Other Legislation Amendment (Assistance and Access) Bill 2018* (10 October 2018); Massachusetts Institute of Technology Internet Policy Research Initiative, Submission No 32 to PJCIS, *Review of the Telecommunications and Other Legislation Amendment (Assistance and Access) Bill 2018* (11 October 2018).

vulnerability implanted under a legitimate and lawful TAN. The vulnerability itself is not systemic, either by reference to the Explanatory Memorandum, the evidence heard by the PJCIS or the terms of the Bill itself. But the imposition of the capability compelled by ASIO or the interception agency might permit a third party to identify a weakness in Apple's security or other software, or use the introduced weakness as leverage to insert their own malware or other program. The amended disclosure provisions make this potential problem worse.<sup>90</sup> Although the Digital Industry Group Inc ('DIGI') requested these changes on the basis of consumer concern around government intrusions into privacy,<sup>91</sup> they might also signal to unethical hackers that a given security flaw is present in the provider's software — all they have to do is find it.

Finally, the laws appear to ignore the transnational nature of the connected economy, where the idea of compelling a multinational such as Google or Facebook to modify its own proprietary software to the detriment of customers in only one of its operating territories is extremely controversial for three reasons. Firstly, such large companies are usually not headquartered in Australia and so may only be bound to comply to the extent that they carry on their operations within the sovereign power or jurisdictional authority of Australia.<sup>92</sup> Should the cost or risk of complying with the jurisdictional requirements become too much, there is a very real risk of such companies restricting or withdrawing their services in Australia. It is worth noting that the Bill also deals with the expansion of ASIO's powers under computer access warrants. In particular, the proposed s 43A of the *SD Act* requires that a computer access warrant only be granted for a computer in a foreign jurisdiction if consent has been obtained from the authority of that country competent to give consent for surveillance devices<sup>93</sup> — there is no such provision for TANs or TCNs.

These companies could also argue that it is not 'practicable' under the *Telecommunications Act 1997* to comply with a TAN or TCN on the grounds that the proposed action would jeopardise customers in other jurisdictions, most notably those covered by the European Union's *General Data Protection Regulation*.<sup>94</sup> As the DIGI put in their submission:

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<sup>90</sup> *Telecommunications and Other Legislation Amendment (Assistance and Access) Act 2018* (Cth) ss 317ZF(14)–(17).

<sup>91</sup> DIGI, Supplementary Submission No 78 to the PJCIS, *Review of the Telecommunications and Other Legislation Amendment (Assistance and Access) Bill 2018* (27 November 2018) 6 ('DIGI submission').

<sup>92</sup> *Telecommunications Act 1997* (Cth) ss 9–11.

<sup>93</sup> *Telecommunications and Other Legislation Amendment (Assistance and Access) Act 2018* (Cth) sch 2 s 1.

<sup>94</sup> *Regulation (EU) 2016/679 of the European Parliament and of the Council of 27 April 2016 on the Protection of Natural Persons with Regard to the Processing of Personal Data and on the Free Movement of Such Data, and Repealing Directive 95/46/EC (General Data Protection Regulation)* [2016] OJ L 119/1.

A Notice may compel businesses with operations or customers outside Australia to take actions in Australia that violate the laws of other countries in which they operate ... The Bill does include a defense to noncompliance with a Notice if it requires an action in a foreign country that would contravene the laws of that country, but there is no defense if a Notice requires a recipient to do an act or thing in Australia that might violate the laws of another country in which it operates or has customers.<sup>95</sup>

In addition, compliance with Australian laws may render the multinational liable to sanctions under the laws of other companies in which it operates, something that Apple makes clear:

Even though this bill grants immunity for compliance with a TAN or TCN, it does not and cannot extend that immunity to cover liability in foreign jurisdictions. For instance, most user content is stored in the United States and US law controls access to that data by law enforcement. Failure on the part of any US entity to follow those requirements gives rise to criminal and civil liability. Most relevant, Title III of the US Omnibus Crime Control and Safe Streets Act would subject Apple to criminal sanctions for any unauthorised interception of content in transit, which this bill could permit. If Australian authorities were to issue a TAN or TCN that required access to data of European Union citizens, Apple could face stiff penalties of up to 4% of its annual turnover under the General Data Protection Regulation, were it to comply.<sup>96</sup>

An introduced weakness or vulnerability might not be considered systemic under s 317B of the Bill, in that it is not a vulnerability or weakness that 'affects a whole class of technology'. However, the definition specifically excises a weakness or vulnerability 'selectively introduced to one or more target technologies that are connected to a particular person'. This 'target technology' may be the particular carriage service, electronic service, software, computer, data processing device or item of equipment directly or indirectly connected to the person. By applying that weakness or vulnerability to that person it nonetheless affects other persons or classes of persons (both domestically and internationally) who use the service, computer or item of sufficient similarity to that individual, such as being on the same network, using the same encryption key, email server, phone or internet service provider — the list is endless. As Greens MP Adam Bandt said:

[I]magine that there's basically a group of people—people under 18 or people in Victoria—all of a sudden now under this proposal. Does that now not count as a systemic weakness, if you say: 'I'm just introducing a backdoor into your app for a particular group of particular people. It's only them that we're going to spy on'? Who knows? Probably.<sup>97</sup>

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<sup>95</sup> DIGI submission (n 91) 12.

<sup>96</sup> Apple (n 72) 7.

<sup>97</sup> Commonwealth, *Parliamentary Debates*, House of Representatives, 6 December 2018, 12781 (Adam Bandt).

So much like ASIC's ill-fated blocking of Melbourne Free University, an unknown and potentially limitless class of persons' privacy located anywhere in the world can be threatened by the issue of a single careless TAN or TCN in Australia.

## VII OVERLAYING THE DISRUPTION CALCULUS

I posit that all of these concerns with the legislation arise from a single root cause that a single law-based solution cannot treat. This root cause is one of regulatory disruption — the substantive disconnection of criminal law enforcement from the target of its investigative activities. Encryption, and its employment in peer-to-peer messaging applications such as WhatsApp, disrupt those enforcement agencies by reducing their capability to detect offending facilitated by the use of those programs. They can, of course, continue to legally intercept communications between two parties (subject to compliance with existing restrictions around telecommunications interception) but without the keys to the encryption being used, are powerless to get to the actual content of the communication which might evidence the offence or identify the perpetrators. Encryption also permits entry to illicit markets more readily by criminal entrepreneurs who have access to cheap, effective mechanisms for communication which are not subject to regulatory oversight, and reduces the likelihood that any evidence obtained against a person might, depending on all of the circumstances, be admissible to prove the circumstances of the offence.

The problem arises because the presence of a disruptor (encrypted communications) facilitates criminal entrepreneurship by:

- a) lowering barriers to entry to the various unlawful markets (sale of drugs, distribution of radical propaganda, planning or conspiring to commit various offences); and
- b) offering new fora for unlawful conduct for incumbent market entrants (for example, being able to plan a fraud in a large company by several employees in a confidential and secure way).

This is not to say that everyday citizens have, with the passage of the Bill into law, taken up opportunities to engage in widespread lawlessness. Instead it reflects the observation that regulators are no longer capable of pursuing their regulatory objectives because of disruption by a new practice, device or system. One could argue that what these amendments seek to do is to restore surveillance capabilities to detect unlawful behaviour. The amendments also look to raise the barriers to entry for offending behaviour by 'forecasting' or 'telegraphing' that encryption methodologies can be compromised at point-of-offer. There is no point using an encrypted service if the service provider can be compelled to hand over your conversations to the police.

I argue that this argument is a hollow one. The proscriptive nature of the definitions of the Act, despite Parliament's best efforts to 'use neutral language', are unlikely to be agile enough to keep pace with the developments of the communications industry.

In addition, law-based command-and-control style regulation is only one possible tool in the armoury of the contemporary regulator.<sup>98</sup> Lastly it ignores the latest research in regulation and governance, which requires that a proper regulatory response

involves recognition that complexity excludes simple governance solutions and that effective governance often requires a combination of mechanisms oriented to different scales, different temporal horizons, etc., that are appropriate to the object to be governed. In this way strategies and tactics can be combined and rebalanced to reduce the likelihood of governance failure in the face of turbulence in the policy environment and changing policy risks.<sup>99</sup>

So I consider that the proper regulatory response requires a concept borrowed from the field of cybernetics<sup>100</sup> — the law of requisite variety where 'only variety can destroy variety'.<sup>101</sup> Single-use methodologies are doomed to failure, and the deployment of the widest possible set of regulatory responses against a disruptor (such as encryption) is crucial. The tools that can be used fall into four categories by reference to Lessig's work,<sup>102</sup> more recently extended by Murray and Scott.<sup>103</sup> These four regulatory methodologies are:

- a) Hierarchy (law, ordinances and the physical instruments of compliance).
- b) Community (typified by 'naming and shaming', or the use of other mechanisms of social feedback to limit or mitigate unlawful behaviour).
- c) Competition (permitting the economic forces of supply and demand in the market promote and encourage compliant behaviour, whilst punishing deviance with financial disincentive).
- d) Design (creating and maintaining architectural solutions to channel and shape regulatees into compliant behaviour, and blocking opportunities for deviance).

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<sup>98</sup> Lawrence Lessig, 'The Law of the Horse: What Cyberlaw Might Teach' (1999) 113(2) *Harvard Law Review* 501, 508.

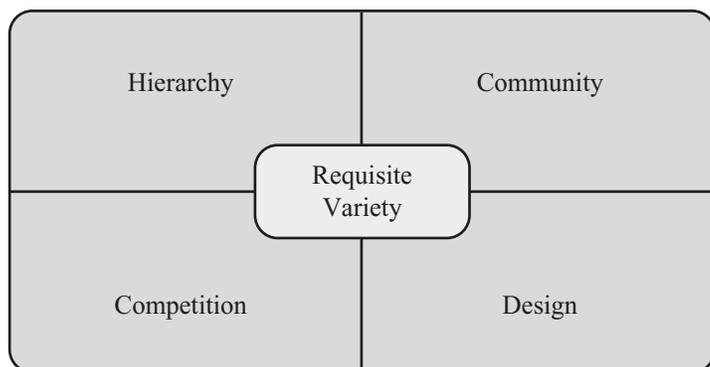
<sup>99</sup> Bob Jessop, 'Metagovernance' in Mark Bevir (ed), *The SAGE Handbook of Governance* (Sage Publications Ltd, 2011) 1, 16.

<sup>100</sup> W Ross Ashby, *Introduction to Cybernetics* (Chapman and Hall, 1956); W Ross Ashby, 'Requisite Variety and its Implications for the Control of Complex Systems' in George J Klir (ed), *Facets of Systems Science* (Springer, 1991) 405.

<sup>101</sup> Stafford Beer, *Decision and Control: The Meaning of Operational Research and Management Cybernetics* (John Wiley & Sons, 1994) 279.

<sup>102</sup> Lawrence Lessig, *Code and Other Laws of Cyberspace* (Basic Books, 1999) 93–4.

<sup>103</sup> Andrew Murray and Colin Scott, 'Controlling the New Media: Hybrid Responses to New Forms of Power' (2002) 65(4) *Modern Law Review* 491.



**Figure 1: The four regulatory methodologies providing requisite variety**

All of these methodologies, brought together in a synergistic whole, give rise to the creation of regulatory solutions with sufficient ‘requisite variety’ to combat regulatory disruption. There are several theoretical examples that show the amendments to the Act do not embrace this concept. Criminals may, for example, migrate from ‘reputable’ messaging apps such as WhatsApp and Signal to other service providers specifically located in overseas jurisdictions. There, safe beyond the territorial reach of Australian law, such providers could legitimately ignore pt 15 notices given to them by the interception agencies and continue to market and offer their products to the less salubrious of society. Our law enforcement and national security agencies remain effectively powerless to stop such conduct, as enforcement options are limited in international jurisdictions that may not recognise the offending conduct as illegal under their sovereign laws.<sup>104</sup>

These laws also promote ‘cockroaching phenomenon’, a term broadly defined as the proliferation of criminal actors in response to increased regulatory scrutiny.<sup>105</sup> Illicit actors who, until now, have communicated using existing commercial off-the-shelf technologies which are happy to cooperate with law enforcement might themselves take the opportunity to branch out into their own telecommunication offerings. There is effectively nothing stopping an enterprising criminal from developing their own ‘Phantom Secure’ platform to protect themselves from government intervention.<sup>106</sup> The host of such a platform is highly unlikely to give the formal nature of a pt 15 Notice due credit or attention. Whilst this might expose them to a civil penalty, it effectively negates the government’s entire encrypted telecommunications policy (not to mention that dismantling such an operation would be incredibly resource-intensive and require potential international cooperation).

<sup>104</sup> For examples of the difficulties: see *Humane Society International Inc v Kyodo Senpaku Kaisha Ltd* [2015] FCA 1275.

<sup>105</sup> Ian Hosein, Prodromos Tsiavos and Edgar A Whitley, ‘Regulating Architecture and Architectures of Regulation: Contributions from Information Systems’ (2003) 17(1) *International Review of the Law of Computers & Technology* 85, 90.

<sup>106</sup> McNally and Stewart (n 10).

Of course, it is simple to suggest that law is not the only tool to solve complex social problems. This is because we are dealing with the concept of crime, which is not always a non-compliance caused by mistake or negligence. Instead it is 'an object of struggle, power, and social forces'<sup>107</sup> and so we need to have some potential examples of how these methodologies might appear when brought to fruition. In other work I have suggested a number of options by which the savvy regulator might use non-law solutions:<sup>108</sup>

- a) Delegating some of their power to the marketplace, by permitting firms to succeed or fail according to compliance with both law and consumer expectation.<sup>109</sup>
- b) Implementing hard-coded or physically engineered technological counter-measures in addition to law reform and market incentives, such as those deployed to protect copyright designs.<sup>110</sup>
- c) Imposition of social stigma with certain kinds of unwanted conduct. For example, whilst committing an act of bankruptcy is not an offence, it garners a high degree of social stigma that discourages or disincentives certain conduct.<sup>111</sup>
- d) Licensing or taxing products or services such as dangerous occupations or substances, rather than outright banning them;<sup>112</sup>

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<sup>107</sup> Steve Tombs, 'Crisis, What Crisis? Regulation and the Academic Orthodoxy' (2015) 54(1) *Howard Journal of Criminal Justice* 57, 69.

<sup>108</sup> Brendan Walker-Munro, 'Disruption, Regulatory Theory and China: What Surveillance and Profiling Can Teach the Modern Regulator' (2019) 8(2) *Journal of Governance and Regulation* 23.

<sup>109</sup> Daniel Spulber, 'Unlocking Technology: Antitrust and Innovation' (2008) 4(4) *Journal of Competition Law & Economics* 915; Timothy Sandefur, *The Permission Society: How the Ruling Class Turns Our Freedoms into Privileges and What We Can Do About It* (Encounter Books, 2016).

<sup>110</sup> Benoît Macq, Patrice Rondao Alface and Mireia Montanola, 'Applicability of Watermarking for Intellectual Property Rights Protection in a 3D Printing Scenario' (Conference Paper, International Conference on 3D Web Technology, 18–21 June 2015).

<sup>111</sup> Paul Ali, Lucinda O'Brien and Ian Ramsay, "'Short a Few Quid": Bankruptcy Stigma in Contemporary Australia' (2015) 38(4) *University of New South Wales Law Journal* 1575.

<sup>112</sup> Mark T Law and Sukkoo Kim, 'Specialization and Regulation: The Rise of Professionals and the Emergence of Occupational Licensing Regulation' (2005) 65(3) *The Journal of Economic History* 723; Kari Lancaster, Kate Seear and Alison Ritter, 'Making Medicine; Producing Pleasure: A Critical Examination of Medicinal Cannabis Policy and Law in Victoria, Australia' (2017) 49 *International Journal of Drug Policy* 117.

- e) Certification as a mark of honour or distinction amongst consumers, who then tend to prefer that product over a competitor.<sup>113</sup> The coffee industry in particular strives for marks or brands of quality as a way of increasing prices or winning customers.<sup>114</sup>
- f) Physical or hard coded barriers to non-compliance, such as chicanes to stop trucks carrying drugs from ramming through Customs road blocks at ports of entry.<sup>115</sup>
- g) Utilising the surveillance or information gathering capabilities of third party agencies to support knowledge gaps in the regulator's awareness of its target population.<sup>116</sup>

By using an approach that is 'more than law', we therefore develop an approach at Figure 2 which I have dubbed the 'disruption calculus'. It offers a glimpse at ways that a modern regulator might choose to use multiple levers to exert the behavioural change it seeks. In the words of Brownsword, regulators can

achieve the desired regulatory effect by relying vicariously on non-governmental pressure ... or by relying on market mechanisms; in addition, they know that careful consideration needs to be given to selecting the optimal mix of various regulatory instruments.<sup>117</sup>

Applying the conceptual model outlined in Figure 2 suggests that the Australian Government would benefit from considering the combined use of the law with other regulatory methodologies and should 'seek contextual, integrated, joined-up strategies that will work in synergy'.<sup>118</sup> The current approach of lawmaking via amendment does not socially stigmatise the unlawful use of encrypted messaging applications. Nor should it, given the attraction of the everyday Australian to the usage of these programs, but there are arguably ways in which it could do so in a non-exclusive fashion. The amendments do not encourage the market to generate or supply applications which would support law enforcement to pursue their objectives in protecting Australians from terrorism, paedophilia or organised crime. And

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<sup>113</sup> Tim Bartley, 'Certification as a Mode of Social Regulation' in David Levi-Faur (ed), *Handbook on the Politics of Regulation* (Edward Elgar Publishing, 2011) 441.

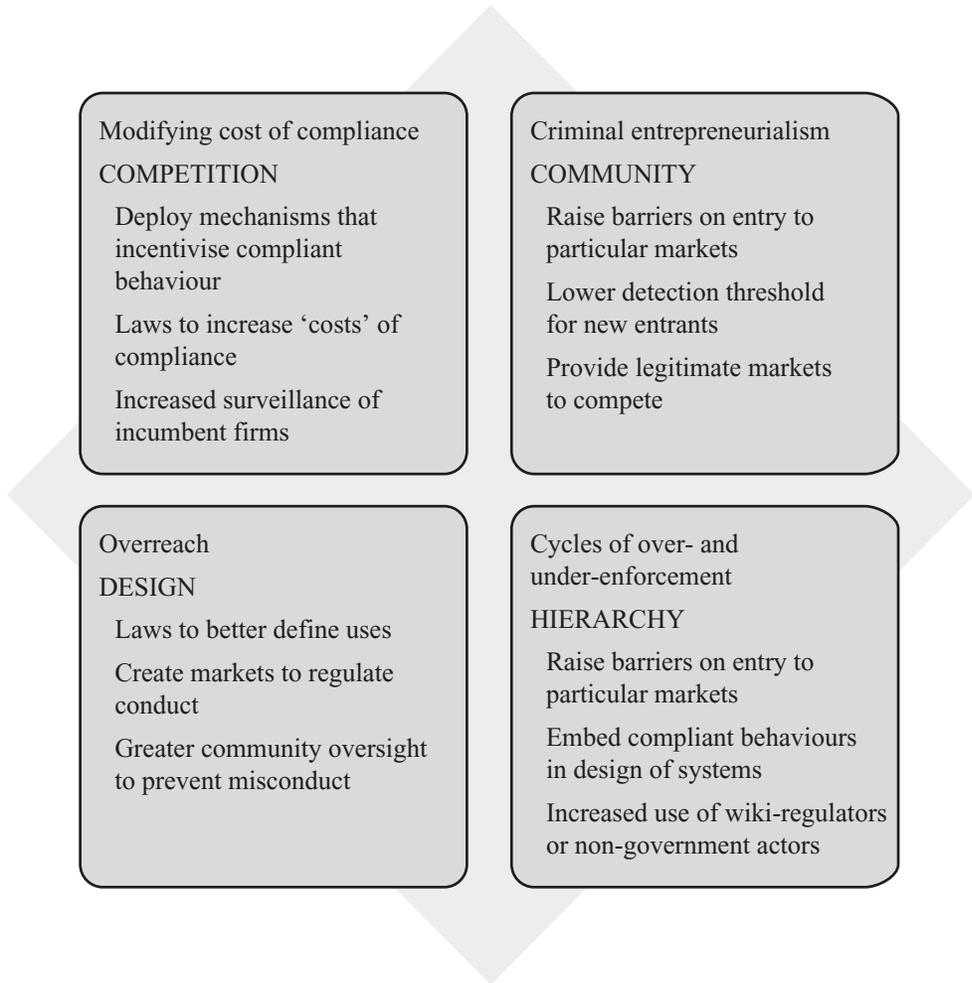
<sup>114</sup> Atika Wijaya and Pieter Glasbergen, 'Toward a New Scenario in Agricultural Sustainability Certification? The Response of the Indonesian National Government to Private Certification' (2016) 25(2) *The Journal of Environment & Development* 219.

<sup>115</sup> Malcolm K Sparrow, *The Character of Harms: Operational Challenges in Control* (Cambridge University Press, 2008) ch 2.

<sup>116</sup> Nicholas Gane, 'The Governmentalities of Neoliberalism: Panopticism, Post-Panopticism and Beyond' (2012) 60(4) *The Sociological Review* 611.

<sup>117</sup> Roger Brownsword, 'Code, Control, and Choice: Why East is East and West is West' (2005) 25(1) *Legal Studies* 1, 1-2.

<sup>118</sup> John Braithwaite, 'The Essence of Responsive Regulation' (2011) 44(3) *University of British Columbia Law Review* 475, 490.



**Figure 2: The Disruption Calculus**

although the Bill attempts to make some rudimentary modification of the architecture of either short messaging services and its overlaid encryption framework to create a space where non-compliance cannot go, it does so without apparent consideration of the broader impacts of introducing such weaknesses. Instead, the law simply creates an additional set of tools for law enforcement and national security agencies that possibly trade off broader or collective electronic security to potentially identify individual instances of wrongdoing.

#### VIII OTHER APPROACHES TO REGULATION PROMOTED BY THE DISRUPTION CALCULUS

What might a multi-modal regulatory response proposed by the disruption calculus look like in practice? Surprisingly, few of the submissions to the PJCIS suggested any

alternatives to Australia's proposed regime. Kaspersky Lab did suggest that Australia instead follow the United States' example of *increasing* encryption to better secure the nation, its citizens and interests.<sup>119</sup> AccessNow recommended utilising existing Mutual Legal Assistance Treaties as well as more collaborative approaches between industry and law enforcement (such as technical experts educating investigators on ways to access data already available).<sup>120</sup> Of relevance to this article is Cannataci's pragmatic approach that offers a non-law solution to this problem. He suggested that there were

other avenues the Government can pursue. These involve collaboration between law enforcement and the tech sector on alternative sources of information to assist organised crime and terrorism investigations ... It is suggested that similar cooperation could be extended to the platforms encrypted products.<sup>121</sup>

This collaborative approach speaks of the kinds of regulatory methodologies contained in the 'market' segment of Figure 2. Looking internationally, we can identify that Israel is a significant world player in the export of computer encryption, surveillance and intrusion technologies.<sup>122</sup> With further analysis, we can identify that Israel adopts a multi-modal regulatory methodology around encryption, where Israeli law and government policy focuses instead on licensing entrants to the market as well as extremely close collaboration between government, universities and private sector.<sup>123</sup> Of course, Israel might seem a confusing choice as they are not part of the Five Eyes alliance — but they have a number of useful benefits on the implementation of market and social regulatory methodologies to deal with a disruptor problem like encryption.

What makes Israel's approaches to regulation of encryption so enticing is their use of competition together with law as a regulatory tool in two respects:

- a) Promoting, encouraging and fostering cooperation between government and tech companies by incentivising compliant and cooperative conduct (such as with access to a large market and favourable tax treatments) rather than relying on legal compulsion and threat of pecuniary enforcement; and
- b) Creating and maintaining a niche market for third party corporations to develop and sell new products that might break or intercept encrypted communications under the imprimatur of existing access regimes.

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<sup>119</sup> For example, Secure Data Act, HR Res 5823, 115<sup>th</sup> Congress (2018).

<sup>120</sup> AccessNow, Submission No 33 to the PJCS, *Review of the Telecommunications and Other Legislation Amendment (Assistance and Access) Bill 2018* (12 October 2018) 12–13.

<sup>121</sup> Cannataci (n 48) 15.

<sup>122</sup> Daniel Benoliel, 'Towards a Cybersecurity Policy Model: Israel National Cyber Bureau Case Study' [2015] (16) *North Carolina Journal of Law & Technology* 435.

<sup>123</sup> Waxman and Hindin (n 7); *ibid* 476.

Part of Israel's approach to the regulation of encryption is via law at first instance. This authority derives from its *Control of Commodities and Services Law 5717–1957*, which delegates authority to Ministers to utilise subordinate legislation to control particular goods and services being developed or offered by Israeli companies or companies operating in Israel. The subsequent order issued in 1974 prohibits engagement in encryption activities without a licence, where engagement includes purchase, sale, import/export, development and distribution.<sup>124</sup> Since 1999, actual regulatory responsibility for Israeli encryption regulation has been the ambit of the Encryption Control Department of the Ministry of Defense ('MOD').<sup>125</sup>

It is important to note that whilst these laws might seem draconian and exert a significant degree of control around the regulation of encryption technology, in reality the MOD exercises a light regulatory touch that is more focused on market development and incentivising compliant behaviours, even by major players such as IBM, Huawei, Apple and Microsoft. At the time of writing, no investigation or prosecution has been undertaken since 1998. There is also a category of licence known as a 'free means' which, if granted, exempts the technological development from regulation altogether. The Israeli Ministry of Defence website lists at least 1,000 encryption items that have been granted a free means licence since 12 June 2016.<sup>126</sup>

More broadly, the Israeli MOD also takes steps to incentivise high-tech markets.<sup>127</sup> Israeli tax law is already particularly advantageous to R&D companies seeking to establish themselves, and individual taxpayer incomes derived from R&D receive reduced tax rates.<sup>128</sup> Other advantages, such as grants and export incentives, are also available.<sup>129</sup> More recent studies have shown Israeli law promoting the 'Silicon Valley effect' has been so successful that '[t]he lessons on the role of Israeli government in promoting high-tech clusters via VC [venture capital] financing programs would be useful for other countries to learn from the Israeli experience'.<sup>130</sup> The Israeli MOD also funds challenges (such as the Combating Terrorism Technology Startup

<sup>124</sup> *Order Governing the Control of Commodities and Services (Engagement in Encryption Items) 5735–1974*.

<sup>125</sup> Ministry of Defense, 'Policy of Control and Licensing of Commercial Encryption Items' (Media Release, 24 September 2000) <[http://www.mod.gov.il/English/Encryption\\_Controls/Pages/Encryption\\_Policy.aspx](http://www.mod.gov.il/English/Encryption_Controls/Pages/Encryption_Policy.aspx)>.

<sup>126</sup> 'Free Means', *Ministry of Defense* (Web Page) <[https://www.mod.gov.il/English/Encryption\\_Controls/Pages/FreeMeans.aspx](https://www.mod.gov.il/English/Encryption_Controls/Pages/FreeMeans.aspx)>.

<sup>127</sup> Dan Senor and Saul Singer, *Start-Up Nation: The Story of Israel's Economic Miracle* (Twelve Publishing, 2011).

<sup>128</sup> *The Law for Encouragement of Research and Development in Industry* (1984) § 1 (Israel).

<sup>129</sup> Yitzhak Hadari, 'The Role of Tax Incentives in Attracting Foreign Investments in Selected Developing Countries and the Desirable Policy' (1990) 24(1) *The International Lawyer* 121; Saul Lach, 'Do R&D Subsidies Stimulate or Displace Private R&D? Evidence from Israel' (2002) 50(4) *The Journal of Industrial Economics* 369.

<sup>130</sup> Jarunee Wonglimpiyarat, 'Exploring Strategic Venture Capital Financing with Silicon Valley Style' (2016) 102 *Technological Forecasting and Social Change* 80.

Challenge)<sup>131</sup> and ‘hackathons’, community events designed to share ideas, create innovations and promote social engagement with computer security problems.<sup>132</sup> It is trite to observe that when a need is well-defined, the market responds positively — when the FBI sought a court order to compel Apple to break the encryption on terrorist Syed Farook’s iPhone, an unknown third party came forward and assisted the FBI with breaking the encryption without Apple’s assistance.<sup>133</sup> As Waxman and Hindin opine:

Israel has created a system that appears to assert tough controls on a broad range of software and technology providers but, in reality, offers a variety of licensing exemptions, eschews direct enforcement, and adopts an overall approach that seeks to encourage compliance and facilitate private sector and government collaboration.<sup>134</sup>

By using the regulatory methodology of competition, Israel’s policy and legal approach to encryption has encouraged major investment from some of the largest tech companies in the world<sup>135</sup> and provides a substantial proportion of the cyber-security and encryption products for sale in the global market.<sup>136</sup> Israel leads the world in its development and implementation of computer security, led in large part by its seamless integration between the private tech sector, the military, law enforcement and Government officials.<sup>137</sup>

The overall effect of Israel’s approach to encryption regulation is staggeringly synchronised:

The country of Israel relies on its centralized law enforcement and cybercrime unit with assistance from private partners like Cellebrite, along with ties to the military and academia ... No concerns or controversies are voiced about exceptional access by the prime minister, members of the Knesset, or other political leaders in the country. The population, a significant number of whom are involved in burgeoning high technology fields, remains silent on the methods used by the Israel Police and the subject of exceptional access at large.

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<sup>131</sup> See generally Israel Defense, ‘Fighting Terrorism with Technology’ (Web Page, 10 February 2016) <<https://www.israeldefense.co.il/en/content/fighting-terrorism-technology>>.

<sup>132</sup> Judy Gray and Taylor Kiland, *Cyber Technology: Using Computers to Fight Terrorism* (Enslow Publishing, 2016).

<sup>133</sup> Office of the Inspector-General, United States Department of Justice, *A Special Inquiry Regarding the Accuracy of FBI Statements Concerning its Capabilities to Exploit an iPhone Seized During the San Bernardino Terror Attack Investigation* (Report, March 2018) 1.

<sup>134</sup> Waxman and Hindin (n 7).

<sup>135</sup> James Donahue, *A Comparative Analysis of International Encryption Policies En Route to a Domestic Solution* (MA Thesis, Naval Postgraduate School, 2018) 43.

<sup>136</sup> Waxman and Hindin (n 7).

<sup>137</sup> Benoliel (n 122) 474–6.

No indication can be seen that technology companies like Apple have any obligations placed on them to assist with exceptional access; nor have companies publicly articulated complaints if such demands were made of them ... Scholars have indicated that Israel's streamlined regulatory framework may be a factor in the assistance it receives from the private sector. No evidence has been found to support such a claim, but it is not an unreasonable assumption.<sup>138</sup>

There are several cogent criticisms of Israel's regulatory framework. Without the benefit of litigation, either in challenge to licence decisions or by way of prosecution for non-compliance, there is no judicial consideration of the way Israel's Encryption Control Department assesses encryption items and exercises their administrative powers. There are also no guidelines or other reporting around the balancing of public interest considerations in licensing decisions made by the MOD.<sup>139</sup> Yet these criticisms seem miniscule when compared to the overwhelming benefits of a regulatory scheme encouraging such close collaboration and partnership between researchers, tech companies and the government. Rather than taking the Australian approach of compelling a tech company to violate its brand and erode the trust of its consumers, the Israeli regulatory approach is one of 'encourag[ing] compliance by minimizing reasons not to comply'.<sup>140</sup>

I do not intend to propose that Australia should adopt Israel's method of regulation, though such an analysis might form a fascinating basis for future research. Instead I consider that the Israel example serves as an illustration that using non-law solutions under the disruption calculus can be as effective as using the compulsion of law. If we remember the four methodologies, Israel's approach to encryption embraces the 'market' methodology to support law enforcement rather than relying on 'law' through compulsion and threats of legal action. Israel also promotes third parties via the 'community' methodology to solve the problems of national security by offering a niche market for the development of products that would assist law enforcement. Such an approach ought to engender more trust from the public whilst also fostering a more cooperative information-sharing arrangement between industry and government.

## IX CONCLUSION

The Commonwealth has sought to forge ahead in its attempts to control a known source of regulatory disruption: encrypted communications. Yet in its haste to bring the conduct of certain classes of criminal actors back into compliance by the passing of the Bill, it fails to substantively deal with the reasons why criminal law regulators

<sup>138</sup> Donahue (n 135) 55–6 (citations omitted).

<sup>139</sup> Barak Jolish, 'The Encryption Debate in Plaintext: National Security and Encryption in the United States and Israel' in Yair Frankel (ed), *Financial Cryptography: 4<sup>th</sup> International Conference, FC 2000 Anguilla, British West Indies, February 20–24, 2000 Proceedings* (Springer International Publishing, 2001) 202.

<sup>140</sup> Waxman and Hindin (n 7).

became disconnected in the first place. In the words of the United Nations Special Rapporteur,

this Bill needs to be put aside. It is fatally flawed. A new approach to addressing the challenges posed by encryption for law enforcement and national security is required.<sup>141</sup>

By reflecting upon the ‘disruption calculus’ as well as by benchmarking against the regulatory methodologies of Israel, we have seen that the amendments to Australia’s telecommunications laws are very likely to have the same issues as the incumbent legislation because they do not adequately address the source of regulatory disconnection. Whilst the proposed amendments might make some headway against the threshold of detection of unlawful activity, they do not address barriers for entry to criminal markets nor the other elements of behavioural adaptation that may be adopted by criminal agents in the market. The framers have also not followed the ‘law of requisite variety’, by failing to embrace multiple domains of control across community, competition or design-based regulatory modalities. In effect, the Commonwealth has taken a shot in the dark, hoping to hit a target. Time will tell whether that shot was accurate or not.

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<sup>141</sup> Cannataci (n 48) 16.



## THE CASE FOR ABOLISHING THE OFFENCE OF SCANDALISING THE JUDICIARY

### ABSTRACT

This article assesses the philosophical foundations and the practical remit of the common law offence of scandalising the judiciary (also known as ‘scandalising contempt’), and finds that the continued existence of this offence as presently constituted cannot be justified. The elements and scope of this offence, it is suggested, are ill-defined, which is a matter of great concern given its potentially fierce penal consequences. Moreover, given the extent to which it may interfere with free expression of opinion on an arm of government, the offence’s compatibility with the implied freedom of political communication guaranteed by the *Australian Constitution* is also discussed — though it is noted that in most instances, prosecutions for the offence will not infringe this protection. The article concludes by suggesting that the common law offence must either be abolished by legislative fiat or replaced by a more narrowly confined statutory offence. It is suggested that an expression of genuinely held belief on a matter of such profound public interest as the administration of justice should not be the subject of proceedings for contempt of court.

### I INTRODUCTION

‘How far can one go in criticising a Judge?’<sup>1</sup> This is the question at the heart of the common law offence known as scandalising the judiciary — an offence that may sound ‘wonderfully archaic’,<sup>2</sup> yet is regrettably anything but. This article attempts to chart the metes and bounds of this offence and to assess its empirical application in Australia and elsewhere. It is concluded that the offence is both vague in definition and savage in its potential punitive consequences. Given the offence’s capacity to seriously impinge on a principle as fundamental as freedom of expression, its compatibility with the *Australian Constitution’s* implied freedom

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\* BIGS (Hons) (Syd), MPhil (Oxon), JD (Melb); Graduate, White & Case. The author acknowledges his debt to the perceptive and constructive comments provided by the *Adelaide Law Review’s* two anonymous reviewers.

<sup>1</sup> *S v Mamabolo* [2001] 3 SA 409, 413; [2001] ZACC 17 [1] (Kriegler J) (Constitutional Court) (‘*Mamabolo*’).

<sup>2</sup> United Kingdom, *Parliamentary Debates*, House of Lords, 2 July 2012, vol 738, col 561 (Lord Beecham).

of political communication is also considered. It is ultimately submitted that the offence ought to be abolished by legislative fiat, or at very least seriously circumscribed in its operation.

## II NATURE OF THE OFFENCE

### A *Situating the Scandalising Offence in the Contempt Landscape*

One eminent legal historian has observed that prosecutions for scandalising contempt have typically ‘arisen when free comment about judges has become too free for the taste of the bench’,<sup>3</sup> and they continue across the Commonwealth of Nations to this day. But what is scandalising contempt? Contempt of court in its criminal strain essentially takes one of two forms: *in facie curiae* (contempt in the face of the court) or *ex facie curiae* (contempt committed outside the courtroom).<sup>4</sup> The scandalising offence is of the latter form; but what sets this offence apart from other forms of contempt is that scandalising contempt ‘does not relate to any *specific* case either past or pending’.<sup>5</sup> Rather, it may be triggered by comments ‘made *outside of* court and *not* relating to ongoing proceedings’<sup>6</sup> that are said to ‘undermine the authority of the courts and public confidence in the administration of justice’.<sup>7</sup>

### B *Safeguarding the Administration of Justice?*

With regard to the offence’s alleged rationale, it is said that there is an ‘overriding interest in protecting the public’s confidence in the administration of justice’.<sup>8</sup> Courts have repeatedly stressed that the harm against which the scandalising offence purports to guard is not harm to the emotional wellbeing of judges as individuals, but rather to the administration of justice — those judges being ‘the channels by which the King’s justice is conveyed to the people’.<sup>9</sup> The judiciary is said to require special

<sup>3</sup> Douglas Hay, ‘Contempt by Scandalizing the Court: A Political History on the First Hundred Years’ (1987) 25(3) *Osgoode Hall Law Journal* 431, 433.

<sup>4</sup> See, eg, *John Fairfax & Sons Pty Ltd v McRae* (1955) 93 CLR 351, 364 (Dixon CJ, Fullagar, Kitto and Taylor JJ) (*McRae*).

<sup>5</sup> *Chokolingo v A-G (Trinidad and Tobago)* [1981] 1 WLR 106, 111 (Lord Diplock) (emphasis added) (*Chokolingo*). See also *Mamabolo* (n 1) 441 (Sachs J).

<sup>6</sup> *Mamabolo* (n 1) 441 (Sachs J) (emphasis added). See also *Solicitor-General (NZ) v Radio Avon Ltd* [1978] 1 NZLR 225, 230 (Richmond P) (*Radio Avon*); *Li Shengwu v A-G (Singapore)* [2019] 1 SLR 1081, 1112 (Steven Chong JA).

<sup>7</sup> *Chokolingo* (n 5) 111 (Lord Diplock).

<sup>8</sup> *A-G (Singapore) v Chee Soon Juan* [2006] SGHC 54, [45]; [2006] 2 SLR(R) 650, 664 (Lai Siu Chiu J) (*Chee Soon Juan*).

<sup>9</sup> *R v Almon* (1765) Wilm 243, 256; 97 ER 94, 100 (Wilmot J); *McRae* (n 4) 372.

protection in this respect because it is ‘the weakest arm of government’, lacking both parliament’s ability to raise revenue and the executive’s coercive powers.<sup>10</sup>

The stakes in matters constituting scandalising contempt are said to be high indeed: should such contempt go unpunished, this would ‘shake the confidence of litigants and the public in the decisions of the Court’ in question ‘and weaken the spirit of obedience to the law’ more generally.<sup>11</sup> In this connection, some authorities stress that the harm done is not to the Court, but ‘to the public by weakening the authority ... of a tribunal which exists for their good alone’.<sup>12</sup> With respect to their Honours, this seems a rather contrived view of the nature of political institutions in modern society. An Ontario Court spoke more realistically of a scandalising prosecution as ‘a matter which concerns the State’, viz, ‘whether there is an offence against the State itself in its administration of justice’.<sup>13</sup>

It is true that a loss of public confidence in the municipal court system’s capacity or willingness to administer justice efficiently and without fear or favour is a deeply undesirable outcome. Public confidence is regarded as foundational for the simple reason that it is ‘the ready acceptance’ by ordinary citizens of orders made by judges that prevents the courts from sliding into popular irrelevance.<sup>14</sup> Once lost, such confidence is difficult to restore, and one need only look to the many nations where such a loss of confidence has occurred — where courts are regarded as possessing about equivalent utility to ‘a door in the middle of an open meadow’<sup>15</sup> — to observe the disastrous social and economic implications of such an eventuality. However, this article argues that the scandalising offence is not necessary to avert this loss of confidence.

### C *Judges Cannot Respond to Criticisms?*

Another justification for the retention of the scandalising offence is the fact that judges may regard it as either inappropriate for, or unworthy of, their office to publicly respond to critics of the courts (by, say, writing letters to the editor of a newspaper), and that there may seem to be no ‘official’ channel through which judges may issue such responses.<sup>16</sup> Lord Denning MR remarked that ‘from the nature of our office, we

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<sup>10</sup> See generally Marilyn Warren, ‘Does Judicial Independence Matter?’ (2011) 150 (Summer) *Victorian Bar News* 12, 18; Emiliou Kyrrou, ‘The Independent, Low Profile Third Arm of Government’ (2017) 91(12) *Law Institute Journal* 32.

<sup>11</sup> *R v Dunbabin; Ex parte Williams* (1935) 53 CLR 434, 445 (Rich J) (‘*Dunbabin*’).

<sup>12</sup> *A-G (NSW) v Bailey* (1917) 17 SR (NSW) 170, 186 (Sly J). See also *Re Brookfield* (1918) 18 SR (NSW) 479, 488 (Cullen CJ).

<sup>13</sup> *Re R v Solloway; Ex parte Chalmers* [1936] OR 469, 479–80 (McTague J).

<sup>14</sup> *Gupta v Union of India* [1982] AIR (SC) 149, 526 (Pathak J).

<sup>15</sup> Martin Krygier, ‘The Hart–Fuller Debate, Transitional Societies and the Rule of Law’ in Peter Cane (ed), *The Hart–Fuller Debate in the Twenty-First Century* (Hart Publishing, 2010) 107, 122.

<sup>16</sup> *Chee Soon Juan* (n 8) [46] (Lai Siu Chiu J). See also Michael Kirby, ‘Attacks on Judges: A Universal Phenomenon’ (1997) 72(8) *Australian Law Journal* 599, 605–6.

cannot reply to their criticisms'.<sup>17</sup> With respect to the judiciary, this difficulty may be readily overcome, and there are signs that judges' practice in this respect is changing. The modern judiciary has developed 'defensive techniques',<sup>18</sup> viz, means by which 'the system explains itself to the community'.<sup>19</sup> Lord Judge has remarked that 'the days when ... communication between the judiciary and the media was regarded as anathema' are long past, and judges and journalists 'can and should' communicate to 'ensure the open administration of justice'.<sup>20</sup> Indeed, Sir Daryl Dawson observed that since the 1960s judges have often availed themselves of newspaper column inches to respond to criticism of the judiciary.<sup>21</sup> In England, the Lord Chief Justice periodically holds 'press conferences to address issues of judicial administration' and to issue 'public statement[s] in answer to criticisms, where appropriate'.<sup>22</sup> Victorian County Court judges recently took to the television airwaves to counter suggestions in the media 'that courts are too soft'.<sup>23</sup> Bearing these factors in mind, much of the force of the 'judges-cannot-reply' argument for retention falls away.

#### D Geography?

Singaporean courts have justified retention of the scandalising offence by reference to the nation's 'small geographical size'<sup>24</sup> (viz, that popular disquiet with the judiciary would spread rapidly in such a jurisdiction — a justification also used by the Privy Council on appeal from the Windward Islands).<sup>25</sup> Further, it is suggested that 'the fact that in Singapore, judges decide both questions of fact and law'.<sup>26</sup> Yet even if one accepts the legitimacy of these two rationales in the Singaporean context

<sup>17</sup> *R v Commissioner of Police of the Metropolis; Ex parte Blackburn* [No 2] [1968] 2 QB 150, 155 (Lord Denning MR).

<sup>18</sup> JD Heydon, 'Does Political Criticism of Judges Damage Judicial Independence?' (2018) 37(2) *University of Queensland Law Journal* 179, 180.

<sup>19</sup> Murray Gleeson, 'Who Do Judges Think They Are?' (1998) 22(1) *Criminal Law Journal* 10, 15.

<sup>20</sup> Lord Judge, *The Safest Shield: Lectures, Speeches and Essays* (Hart Publishing, 2015) 157. See also Kirby (n 16) 599.

<sup>21</sup> Sir Daryl Dawson, 'Judges and the Media' (1987) 10(1) *University of New South Wales Law Journal* 17, 27.

<sup>22</sup> Lord David Pannick, "'We Do Not Fear Criticism, Nor Do We Resent It": Abolition of the Offence of Scandalising the Judiciary' [2014] (Jan) *Public Law* 5, 10.

<sup>23</sup> Tineka Everaardt, 'County Court Judges Defend Judicial System Amid Calls for Overhaul' *9News* (online, 26 September 2018) <<https://www.9news.com.au/2018/09/26/18/45/victorian-county-court-judicial-process-inside-look-judges>>. See also Marilyn Warren, 'Chief Justice's Comments on the Appeals Process and Published Judgments in Response to Questions from the Herald Sun Newspaper' [2010] (1) *Victorian Judicial Scholarship* 37 <<http://www5.austlii.edu.au/au/journals/VicJSchol/2010/37.pdf>>.

<sup>24</sup> *A-G (Singapore) v Hertzberg Daniel* [2008] SGHC 218, [33] (Tay Yong Kwang J) ('*Hertzberg Daniel*').

<sup>25</sup> *McLeod v St Aubyn* [1899] AC 549, 561 (Lord Morris) ('*McLeod*').

<sup>26</sup> *Hertzberg Daniel* (n 24) [33] (Tay Yong Kwang J).

(and acceptance is not universal),<sup>27</sup> neither rationale is applicable in Australia, which is comparatively much larger and retains jury trials.<sup>28</sup> At any rate, as even a Singaporean court has recently conceded, advances in telecommunications technology have rendered ‘geographical size’ largely irrelevant in this context ‘for the very simple reason that even in a geographically large jurisdiction, information can still be disseminated both quickly and widely’.<sup>29</sup> A scurrilous Tweet or WhatsApp message about, say, alleged curial misconduct is transmitted more or less instantly, regardless of whether the sender and recipient are separated by the breadth of a small island or of an entire continent.

### E *Is the Offence Obsolete?*

The scandalising offence has on several occasions been confidently declared moribund, only for it to later re-emerge from beyond the proverbial crypt. In 1899, the Privy Council remarked that the offence was ‘obsolete’ in England,<sup>30</sup> only for proceedings to be brought against a Birmingham publisher the following year.<sup>31</sup> In 1984, Lord Diplock once again provided assurances that the offence was ‘virtually obsolescent’ in Britain,<sup>32</sup> only for scandalising contempt to be revitalised in 2012 by an attempt to prosecute a former government minister for describing a judge as ‘off his rocker’<sup>33</sup> — sparking a media furore that led to the offence’s statutory abolition. A British Columbian judge felt able to declare in 1990 that ‘the offence ... seems to have disappeared ... from the judicial horizon in this country’.<sup>34</sup> However, notwithstanding his Honour’s optimism, prosecutions have in fact continued across Canada.<sup>35</sup> In the first two decades of the 20<sup>th</sup> century, the High Court of Australia twice referred to the scandalising offence in England as falling into desuetude<sup>36</sup> — only for a newspaper editor to be successfully prosecuted in the 1930s for an article

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<sup>27</sup> Kevin YL Tan, ‘Defaming Politicians, Scandalizing the Courts: A Look at Recent Developments in Singapore’ in Andrew T Kenyon, Tim Marjoribanks and Amanda Whiting (eds), *Democracy, Media and Law in Malaysia and Singapore: A Space for Speech* (Routledge, 2014) 105, 113–15.

<sup>28</sup> *Australian Constitution* s 80. See generally *Alqudsi v The Queen* (2016) 258 CLR 203.

<sup>29</sup> *Shadrake Alan v A-G (Singapore)* [2011] SGCA 26, [31]; [2011] 3 SLR 778, 793 (Andrew Phang Boon Leong JA).

<sup>30</sup> *McLeod* (n 25) 561 (Lord Morris).

<sup>31</sup> *R v Gray* [1900] 2 QB 36 (‘Gray’).

<sup>32</sup> *Secretary of State for Defence v Guardian Newspapers Ltd* [1985] AC 339, 347 (Lord Diplock).

<sup>33</sup> United Kingdom, *Parliamentary Debates*, House of Lords, 2 July 2012, vol 738, col 556–7 (Lord Pannick).

<sup>34</sup> *R v High Sierra Broadcasting Ltd* [1990] BCJ No 1998; [1990] BCSC 1542 (17 September 1990) (MacDonald J).

<sup>35</sup> *A-G (Newfoundland) v Hanlon* (2000) 195 Nfld & PEIR 241 (Supreme Court of Newfoundland); *R v Gillespie* [2001] 3 WWR 125 (Court of Queen’s Bench of Manitoba) (‘Gillespie’); *R v Prefontaine* [2003] 5 WWR 367 (Court of Queen’s Bench of Alberta).

<sup>36</sup> *R v Nicholls* (1911) 12 CLR 280, 285 (Griffith CJ); *Bell v Stewart* (1920) 28 CLR 419, 428–9 (Isaacs and Rich JJ).

describing the High Court as a ‘pestilent’ institution whose decisions ‘pleased no one but “the Little Brothers of the Soviet [and kindred intelligentsia]”’.<sup>37</sup> Five decades later, a majority of the High Court confirmed the vitality of the law of scandalising contempt in *Gallagher* (notwithstanding a furious dissent from Murphy J).<sup>38</sup> However, *Gallagher* was a (failed) application for special leave, and as members of the High Court have recently reiterated, remarks made in the published reasons for the dismissal of such applications are of no precedential value ‘and are binding on no one’.<sup>39</sup> Nevertheless, Mason CJ seemingly accepted the offence as part of the law of Australia in *Nationwide News*.<sup>40</sup> More recently, the High Court was almost called upon in *Re Colina* to consider whether ‘the offence of scandalising the court was obsolete’, but counsel ultimately dropped this argument at trial.<sup>41</sup> Despite John Basten assuring an audience in 2005 that ‘prosecutions for ... scandalising a court are rare in recent times’,<sup>42</sup> and notwithstanding what might be construed as ambiguous High Court authority, the offence has ‘made something of a comeback’ in this country.<sup>43</sup> The Family Court recently reiterated its jurisdiction to punish where a publication ‘contemptuously scandalises th[e] [c]ourt’,<sup>44</sup> as have the New South Wales and Queensland Courts of Appeal,<sup>45</sup> the Supreme Courts of New South Wales and Western Australia<sup>46</sup> and the New South Wales Land and Environment Court.<sup>47</sup>

The jurisdiction to punish the scandalising offence ‘is always potentially a political’ one.<sup>48</sup> And indeed, courts around the Commonwealth of Nations have often used purportedly febrile political situations to justify the existence of the jurisdiction. During

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<sup>37</sup> *Dunbabin* (n 11) 444 (Rich J).

<sup>38</sup> *Gallagher v Durack* (1983) 152 CLR 238, 243–5 (Gibbs CJ, Mason, Wilson and Brennan JJ); 245–53 (Murphy J) (*‘Gallagher’*).

<sup>39</sup> *Mount Bruce Mining Pty Ltd v Wright Prospecting Pty Ltd* (2015) 256 CLR 104, 133 (Kiefel and Keane JJ).

<sup>40</sup> *Nationwide News Pty Ltd v Wills* (1992) 177 CLR 1, 31–2 (Mason CJ) (*‘Nationwide News’*).

<sup>41</sup> *Re Colina; Ex parte Torney* (1999) 200 CLR 386, 405–6 (Kirby J) (*‘Re Colina’*).

<sup>42</sup> John Basten, ‘Court and Media Relationships’ (Speech, National Judicial College Conference, 30 October–4 November 2005) <[http://www.supremecourt.justice.nsw.gov.au/Documents/Publications/Speeches/Pre-2015%20Speeches/Basten/basten\\_2005.10.30c.pdf](http://www.supremecourt.justice.nsw.gov.au/Documents/Publications/Speeches/Pre-2015%20Speeches/Basten/basten_2005.10.30c.pdf)>.

<sup>43</sup> *Howard v Gallagher* (1988) 18 FCR 233, 249 (Gray J).

<sup>44</sup> *Xuarez v Vitela* [2012] FamCA 574, [50], [56] (Forrest J).

<sup>45</sup> *Mahaffy v Mahaffy* (2018) 97 NSWLR 119, 156–7 (Simpson JA); *Markan v Queensland Police Service* [2015] QCA 22, [13]–[14] (Jackson J).

<sup>46</sup> *Yeshiva Properties No 1 Pty Ltd v Lubavitch Mazal Pty Ltd* [2003] NSWSC 775, [48]–[49] (Young CJ in Eq); *Re Glew; Ex parte A-G (WA)* [2014] WASC 107, [30]–[32] (EM Heenan J).

<sup>47</sup> *Environment Protection Authority v Pannowitz* (2006) 164 A Crim R 325, 341–2 (Lloyd J).

<sup>48</sup> Tim Hamlett, ‘Scandalising the Scumbags: *The Secretary for Justice vs the Oriental Press Group*’ (2001) 11(3) *Asia Pacific Media Educator* 20, 29.

the Malayan Emergency,<sup>49</sup> a Kuala Lumpur Court convicting a newspaper publisher held that ‘the continued defiance of the forces of law and order by bands of armed terrorists’ made it ‘more than ever essential that the confidence of the community’ in judicial integrity ‘should be sustained at the highest pitch’.<sup>50</sup> Admittedly, a prosecution launched amid a violent communist insurgency is an extreme example of the scandalising jurisdiction at work. However, even in the comparatively placid political context of present-day Australia, there still lurks the danger of actions for scandalising contempt having unpalatably political implications, as it involves courts setting limits on acceptable forms of discourse about public institutions (namely, courts themselves). In a highly publicised 2017 incident, for instance, three federal ministers were brought before the Victorian Court of Appeal following the publication of statements critical of that Court’s sentencing practices<sup>51</sup> — in part because the Court was ‘concerned that some of the statements purported to scandalise the court’, viz, were ‘calculated to improperly undermine public confidence in the administration of justice in [Victoria]’.<sup>52</sup>

### III ISSUES WITH THE OFFENCE

#### *A No Clear Definition of the Sort of Speech it Covers*

The Constitutional Court of South Africa, in upholding a conviction for the scandalising offence, admitted that it may be impossible to formulate a ‘litmus test’ to determine in every instance ‘whether the mark of acceptable comment has been overstepped’.<sup>53</sup> In *Ahnee v Director of Public Prosecutions (Mauritius)*,<sup>54</sup> the Privy Council considered whether the somewhat amorphous nature of the scandalising offence violated the ‘requirement that in criminal matters any law must be formulated with sufficient precision to enable the citizen to regulate his conduct’.<sup>55</sup> While conceding that the offence is ‘sui generis and ... not part of the ordinary criminal

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<sup>49</sup> A conflict centred on a communist insurgency against first the British colonial authorities in the Federation of Malaya and later the independent Malaysian state that ran from 1948 to 1960.

<sup>50</sup> *Public Prosecutor (Malaya) v Palaniappan* (1949) 15 MLJ 246, 248 (Spenser-Wilkinson J).

<sup>51</sup> Simon Benson, ‘Judiciary “Light on Terrorism”’, *The Australian* (online, 13 June 2017) 6.

<sup>52</sup> Victorian Court of Appeal, ‘Statement of the Court of Appeal in Terrorism Cases: *CDPP v Besim* and *CDPP v MHK*’ *Supreme Court of Victoria* (Web Page, 17 October 2017) <<https://www.supremecourt.vic.gov.au/contact-us/news/statement-of-the-court-of-appeal-in-terrorism-cases>>. See also *DPP (Cth) v Besim [No 2]* (2017) 52 VR 296, 297–8 (Warren CJ, Weinberg and Kaye JJA).

<sup>53</sup> *Mamabolo* (n 1) [26] (Kriegler J).

<sup>54</sup> [1999] 2 AC 294 (*Ahnee*).

<sup>55</sup> *Ibid* 306 (Lord Steyn), quoting *Sunday Times v United Kingdom* [1979] 2 Eur Court HR 245.

law', the Board nevertheless concluded that sufficient clarity could be obtained from the body of existing case law.<sup>56</sup> With respect to their Lordships, this author cannot agree. It has been said that one of the cardinal principles of the criminal law is that 'no one should be punished under a law unless it is sufficiently clear and certain to enable him to know what conduct is forbidden before he does it',<sup>57</sup> and the vagueness with which the scandalising offence has been defined offends this principle.

One of the elements of scandalising contempt repeatedly referred to by courts is that the impugned comments amount to 'scurrilous abuse'.<sup>58</sup> Assurances that legitimate criticisms of judges are permissible are often followed by declarations that '[t]here is, however, a limit' — defined in only the vaguest terms — and that the criticisms in question 'exceeded that limit'.<sup>59</sup> This leaves future commentators little practical guidance on whether they too may inadvertently violate this limit. Martin, surveying the Canadian cases, suggests that courts' inconsistent decisions — with one court holding a description of a curial decision as 'silly' to constitute scandalising contempt, but another acquitting a defendant who described a coronial proceeding as 'one of the worst examples of idiocy ... [he had] ever seen' — indicates that no reliable 'standard for determining what is or is not scurrilous abuse' has coalesced.<sup>60</sup> In Victoria, calling a judge 'a wanker' has been held not to constitute scandalising contempt as this expression does 'not undermine confidence in the administration of justice'.<sup>61</sup> Ultimately, whether a given set of words constituted 'scurrilous abuse' appears to hinge on little more than 'the literary taste of the presiding judge'.<sup>62</sup> Put another way, the offence attaches liability pursuant to 'a criterion ... based on politeness' — a state of affairs that creates 'serious difficulties' both in principle and, as noted, in practice.<sup>63</sup> This lack of clarity is important, given that the question of scurrilous or not scurrilous conduct appears to be one of the only yardsticks courts are able to employ to determine whether a given utterance undermines the administration of justice generally. This is so because no other form of empirical verification is truly available — 'difficult' (perhaps even insuperable) 'sociological questions' lie

<sup>56</sup> Ibid.

<sup>57</sup> *R v Rimmington* [2006] 1 AC 459, 482 (Lord Bingham), quoting *R v Clark (Mark)* [2003] 2 Cr App R 363, [13].

<sup>58</sup> See, eg, *Gray* (n 31) 39–40 (Lord Russell CJ); *Chokolingo* (n 5) 109 (Lord Diplock); *R v Hoser* [2001] VSC 443 [46] (Eames J); *A-G (Qld) v Lovitt* [2003] QSC 279 [56] (Chesterman J); *Secretary of Justice v Choy Bing Wing* [2011] 2 HKC 342, 355 (McMahon and Macrae JJ).

<sup>59</sup> *R v Murphy* (1969) 4 DLR (3d) 289, 295 (Bridges CJNB) (Supreme Court of New Brunswick, Appeal Division) (*Murphy*).

<sup>60</sup> Robert Martin, 'Criticising the Judges' (1982) 28(1) *McGill Law Journal* 1, 15.

<sup>61</sup> *Anissa Pty Ltd v Parsons* [1999] VSC 430 [22] (Cummins J).

<sup>62</sup> Martin (n 60) 16.

<sup>63</sup> Pannick (n 22) 9.

at the heart of the scandalising ‘analysis’.<sup>64</sup> Chief amongst these is ‘to what extent do [the media] create community attitudes?’<sup>65</sup>

Karl Marx once wrote that any defence of censorship must be ultimately be rooted in the belief in the ‘immaturity of the human race’, the belief that there are certain topics that human beings cannot rationally discuss if left to their own devices.<sup>66</sup> The view that media coverage of courts and judicial officers that is ‘too negative too often’ imperils public confidence in the administration of justice is predicated on the assumption that the audience of that media coverage is so unsophisticated and so lacking in critical faculties that it will simply accept the unfavourable stories as gospel truth, losing confidence in the judiciary accordingly. Put another way, this view assumes that public perceptions are a direct function of media reporting — but empirical evidence on this point is somewhat equivocal.<sup>67</sup>

The notion that a ‘gullible’ public<sup>68</sup> are liable to have their confidence in the courts easily shaken by unkind remarks about the judiciary is a ‘highly speculative’ one that discounts the public’s ability to assess and ultimately reject such remarks.<sup>69</sup> One Manitoban judge, casting doubt on the ‘validity of this assumption’, also observed that ‘it is not recognized in the United States’.<sup>70</sup> This was confirmed in *Pennekamp* where the United States Supreme Court overturned a conviction for contempt recorded against the publishers of the *Miami Herald* on the basis that the Court was not convinced that the ‘solidity of evidence’ existed such as to conclude that the impugned publication represented a sufficiently clear threat to the administration of justice.<sup>71</sup> Sir Daryl Dawson remarked that he could see no obvious means of assessing the impact of media commentary on public confidence in the courts beyond the rather unsophisticated (and, one might add, empirically unverified) assumption that the harsher the words, the greater the impact.<sup>72</sup> And indeed, what possible barometer could be used to assess public confidence in the administration of justice, or indeed whether given utterances have dented that confidence? In the Singaporean context,

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<sup>64</sup> Comment, ‘Free Speech vs. the Fair Trial in the English and American Law of Contempt by Publication’ (1950) 17(3) *University of Chicago Law Review* 540, 552.

<sup>65</sup> *Ibid.*

<sup>66</sup> Karl Marx and Friedrich Engels, *Collected Works* (Lawrence & Wishart, 2010) vol 1, 153.

<sup>67</sup> New South Wales Law Reform Commission, *Contempt by Publication* (Discussion Paper No 43, July 2000) 53–61; Law Reform Commission of Western Australia, *Discussion Paper on Contempt by Publication* (Project No 93, March 2002) 16–29.

<sup>68</sup> *R v Kopyto* (1987) 47 DLR (4<sup>th</sup>) 213, 255 (Houlden JA) (Ontario Court of Appeal).

<sup>69</sup> *Ibid* 223 (Cory JA). See also Lynn McDonald, ‘Contempt of Court: An Unsuccessful Attempt to Use Sociological Evidence’ (1970) 8(3) *Osgoode Hall Law Journal* 573, 581–2; Australian Law Reform Commission, *Contempt* (Report No 35, 1987), 251; Pannick (n 22) 8.

<sup>70</sup> *Gillespie* (n 35) 132 (Morse J).

<sup>71</sup> *Pennekamp v Florida*, 328 US 331, 347 (Reed J) (1946) (*‘Pennekamp’*).

<sup>72</sup> Dawson (n 21) 30.

Tsun Hang Tey observes that the terminological 'laxity' courts have demonstrated in alternating between speaking of 'ordinary' and 'reasonable reader[s]' in this context has created uncertainty as to the precise content of the relevant test.<sup>73</sup>

Put more simply, the very existence of the mischief that the scandalising offence purports to remedy is entirely open to question — and surely sturdier foundations than this are necessary before penal consequences as severe as those associated with the law of contempt are brought to bear on accused persons.

### B *No Certainty as to Mens Rea Required*

It has been judicially observed that '[m]ens rea in the law of contempt is something of a minefield'.<sup>74</sup> Indeed, an ongoing area of uncertainty in relation to the scandalising offence is whether there is even a requirement for mens rea. In *S v Van Niekerk*, a South African court held that 'the act complained of must ... be wilful' and 'made with the *intention* of bringing the Judges in their judicial capacity into contempt'.<sup>75</sup> Canadian courts have sometimes reasoned similarly to find that '*mens rea* is clearly an important element in the offence'.<sup>76</sup> In *Perera*, the Privy Council held that the appellant had not scandalised the Ceylonese judiciary because his criticisms were 'honest' and made 'in good faith'.<sup>77</sup> Yet authority exists in support of precisely the contrary proposal, namely, that there is no such mental element to the offence and 'that lack of intention or knowledge is no excuse'.<sup>78</sup> In *Ahnee*, for instance, the Privy Council held that there was no such requirement, provided that the publication of the impugned material was intentional so as to undermine the authority of the court.<sup>79</sup> Likewise, Canadian authority suggests that 'intent to ... interfere with the course of justice is not an essential ingredient', it is enough if the action complained of is inherently likely so to do'.<sup>80</sup> Australian courts have suggested that the defendant's 'inten[tion] ... to scandalise the court'<sup>81</sup> is not itself dispositive of the matter.<sup>82</sup> In New Zealand, 'the mens rea element is satisfied by proof that the defendant knowingly

<sup>73</sup> Tsun Hang Tey, 'Criminalising Critique of the Singapore Judiciary' (2010) 40(3) *Hong Kong Law Journal* 751, 768–70.

<sup>74</sup> *A-G (UK) v Newspaper Publishing PLC* [1988] Ch 333, 373 (Donaldson MR).

<sup>75</sup> *S v Van Niekerk* [1970] 3 SA 655, 657 (Claassen J) (Provincial Division) (emphasis added).

<sup>76</sup> *Re Ouellet [No 1]* (1976) 67 DLR (3d) 73, 91–2 (Hugessen ACJ) (Superior Court of Quebec) (emphasis in original).

<sup>77</sup> *Perera v The King* [1951] AC 482, 488 (Lord Radcliffe). See also *Re A-G (Canada)* (1975) 65 DLR (3d) 608, 619 (Disbery J) (Supreme Court of the Northwest Territories).

<sup>78</sup> *R v Odhams Press Ltd, Ex parte A-G (UK)* [1957] 1 QB 73, 79–80 (Lord Goddard CJ).

<sup>79</sup> *Ahnee* (n 54) 307 (Lord Steyn).

<sup>80</sup> *Newfoundland Association of Public Employees v A-G (Newfoundland)* (1984) 14 DLR (4th) 323, 330 (Morgan JA) (Newfoundland Court of Appeal).

<sup>81</sup> *Wade v Gilroy* (1986) 83 FLR 14, 27 (Frederico J).

<sup>82</sup> *McRae* (n 4). See also *Fitzgibbon v Barker* (1992) 111 FLR 191, 201, (Barblett DCJ, Nygh and Purdy JJ).

carried out the act or was responsible for the conduct in question'.<sup>83</sup> In *Bing*, a Hong Kong court found that while there was no evidence that the defendant had engaged in 'a deliberately orchestrated campaign of interference with the administration of justice',<sup>84</sup> his 'invective and vilification directed against a particular judicial officer in her public capacity' was nevertheless sufficient to 'amount to a contempt of court' of the scandalising variety.<sup>85</sup> Milton suggests that regarding the offence as one of strict or absolute liability is 'both anomalous and contrary to principle'; no other species of contempt is so regarded. Moreover, removing this fault element is at odds with the common law presumption that mens rea is (absent express legislative stipulation) a requisite element of an offence.<sup>86</sup> And indeed, this was ultimately consistent with the conclusion reached by the Privy Council in *Dhooharika*<sup>87</sup> — a conclusion that accords with principle.

### C *Unlimited Penal Consequences*

The penal consequences of a scandalising conviction can be 'savage',<sup>88</sup> and indeed, strictly speaking there exist 'technically no legal limits' as to the fine or term of imprisonment that may be imposed.<sup>89</sup> In practice, modest fines are the typical penalty (NZD500 in *Radio Avon*, for instance).<sup>90</sup> However, custodial sentences are sometimes handed down: in 1969, a New Brunswick student newspaper contributor who condemned Canada's courts as being in the pocket of moneyed interests found himself sentenced to 10 days' imprisonment.<sup>91</sup> Likewise, in *Gallagher*, the appellant spent three months behind bars for suggesting that industrial action had resulted in an appeal against an earlier conviction being allowed by the Full Court of the Federal Court.<sup>92</sup> Moreover, Kirby J once suggested in obiter that the sentence in 'a serious case of scandalising a court would certainly be liable to extend beyond imprisonment for twelve months'.<sup>93</sup> It is contrary to principle that an offence with as vague a definitional outline as scandalising contempt should be accompanied by such swingeing penal powers.

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<sup>83</sup> *Solicitor-General (NZ) v Radio New Zealand Ltd* [1994] 1 NZLR 48, 55 (Eichelbaum CJ and Greig J).

<sup>84</sup> That is, that his poison-pen letters regarding the alleged corruption of a High Court registrar were unlikely to actually impair confidence in the judiciary.

<sup>85</sup> *Choy Bing Wing* (n 58) 355 (McMahon and Macrae JJ).

<sup>86</sup> JRL Milton, 'A Cloistered Virtue' (1970) 87(4) *South African Law Journal* 424, 426.

<sup>87</sup> *Dhooharika v DPP (Mauritius)* [2015] AC 875, 891 (Lord Clarke JSC).

<sup>88</sup> *Gallagher* (n 38) 252 (Murphy J).

<sup>89</sup> *Radio Avon* (n 6) 229 (Richmond P).

<sup>90</sup> *Ibid* 242 (Richmond P).

<sup>91</sup> *Murphy* (n 58) 291 (Bridges CJNB).

<sup>92</sup> *Gallagher* (n 38) 242 (Gibbs CJ, Mason, Wilson and Brennan JJ).

<sup>93</sup> *Re Colina* (n 41) 427 (Kirby J).

D *Extremely Wide Standing*

That the standing to bring actions for scandalising contempt is so broad only adds to the oppressiveness of the offence: in *McGuirk*, the Supreme Court of New South Wales held that any 'private litigant' may initiate scandalising offence proceedings.<sup>94</sup>

It is true that the standing requirements for all species of contempt of court have always been broad. For contempt committed during specific court proceedings, anyone possessing a 'personal stake or special interest' in those proceedings may bring proceedings for contempt.<sup>95</sup> In *European Asian Bank AG v Wentworth*, for instance, an employee of the appellant bank (a witness in litigation in which the bank was at that time involved) was physically assaulted in a courtroom by the respondent during proceedings involving the bank. The New South Wales Court of Appeal affirmed the bank's right as a private litigant to launch contempt proceedings against the respondent for this contempt.<sup>96</sup> There is no requirement that such proceedings be brought by either the relevant Director of Public Prosecutions or Attorney-General,<sup>97</sup> though, especially for alleged contempt in criminal matters, it may be that private persons may bring an action only if the relevant Attorney-General has declined to do so,<sup>98</sup> and that once proceedings are in motion that Attorney-General may intervene to take carriage of them.<sup>99</sup>

The justification for this breadth of standing has been held to inhere within individual litigants a personal interest in the maintenance of 'the integrity of the administration of justice'.<sup>100</sup> Wide though it may be, standing for contempt connected with particular proceedings is nevertheless probably restricted to an easily ascertainable group of persons with some interest of the requisite kind in those proceedings. To borrow a concept from the law of trusts, 'list certainty' could theoretically be achieved as regards the class of persons with the relevant *locus standi*.<sup>101</sup> However, with the scandalising offence, matters stand differently. Insofar as every member of the community has a stake in the upholding of the due administration of justice, every individual in a given jurisdiction might well have standing to pursue an action for the scandalising offence. It is unclear, however, why any exception to the general principle that private persons may not, absent some tangible individual stake in the matter (that is, some stake 'over and above that of being a member of the public'),<sup>102</sup>

<sup>94</sup> *McGuirk v University of New South Wales* [2009] NSWSC 1058, [284]–[286] (James J).

<sup>95</sup> *United Telecasters Sydney Ltd v Hardy* (1991) 23 NSWLR 323, 328 (Samuels AP) ('*United Telecasters*').

<sup>96</sup> (1986) 5 NSWLR 445.

<sup>97</sup> *New South Wales Bar Association v Muirhead* (1988) 14 NSWLR 173, 184 (Kirby P).

<sup>98</sup> *Re Whitlam; Ex parte Garland* (1976) 8 ACTR 17, 24 (Connor J).

<sup>99</sup> *United Telecasters* (n 95) 330–1 (Samuels AP).

<sup>100</sup> *DPP (NSW) v Australian Broadcasting Corporation* (1987) 7 NSWLR 588, 595–6.

<sup>101</sup> *Re Gulbenkian's Settlements* [1970] AC 508; *McPhail v Doulton* [1971] AC 424.

<sup>102</sup> *John Fairfax Publications Pty Ltd v Doe* (1995) 37 NSWLR 81, 101 (Kirby P) ('*Doe*').

‘sue on behalf of the public for the purpose of preventing public wrongs’.<sup>103</sup> The one exception to this principle that may be acceptable as a matter of policy is where the alleged scandalising words or conduct threatens in some way to ‘interfere with [the would-be plaintiff’s] right to a fair trial’.<sup>104</sup>

It has been said in the United States that the ultimate purpose of standing is to ensure that questions placed before the courts will be dealt with in ‘a concrete factual context conducive to a realistic appreciation of the consequences of judicial action’, rather than in purely abstract terms.<sup>105</sup> To permit litigants to bring matters without such a concrete basis would be to waste courts’ time by insisting they take on ‘the rarified atmosphere of a debating society’.<sup>106</sup> Absent restrictions on standing, the volume of frivolous litigation would multiply, as any ‘mere busybody who is interfering in things which do not concern [them]’ would be free to fill the court lists with action after action.<sup>107</sup> Curial time and resources being finite, courts rightly take a dim view to such busybodies, and seek to restrict as far as possible their capacity to bring litigation that is personally meaningless to them. To the extent that the breadth of the scandalising offence’s standing permits such busybodies to bring frivolous actions of this kind, the offence appears to pose just such a threat. If the offence is not abolished, any statutory reform of its scope must restrict the breadth of the class of persons who possess the necessary *locus standi*.

#### E *Incompatibility with the Implied Freedom of Political Communication*

So far this article has assessed the scandalising offence by reference to non-jurisdiction-specific criteria, such as vagueness and oppressiveness. However, there is a further, distinctly Australian benchmark: whether the offence is compatible with the implied freedom of political communication detected by the High Court in the *Australian Constitution*. The High Court has held that even ‘unreasonable, strident, hurtful and highly offensive communications’ may well ‘fall within the range of ... “robust” debate’ in Australian politics.<sup>108</sup> Can the communications often prosecuted under the scandalising offence be regarded as a protected political communication?

Analytic clarity is not enhanced here by the fact that the breadth of the freedom is somewhat uncertain. McHugh J took a narrow view in *Australian Capital Television* — that the freedom is restricted to ‘information concerning matter intended

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<sup>103</sup> *Gouriet v Union of Post Office Workers* [1978] AC 435, 494 (Viscount Dilhorne); *Australian Conservation Foundation v Commonwealth* (1980) 146 CLR 493, 538 (Stephen J).

<sup>104</sup> *Doe* (n 102) 84 (Gleeson CJ).

<sup>105</sup> *Valley Forge Christian College v Americans United for Separation of Church and State Inc*, 454 US 464, 472 (Rehnquist J) (1982).

<sup>106</sup> *Ibid.*

<sup>107</sup> *A-G (The Gambia) v N’Jie* [1961] AC 617, 634 (Lord Radcliffe). See also *Hussein v Secretary, Department of Immigration and Multicultural Affairs [No 2]* (2006) 155 FCR 304, 322 [73] (Graham J).

<sup>108</sup> *Monis v The Queen* (2013) 249 CLR 92, 131 (French CJ).

or likely to affect voting in an election'<sup>109</sup> — while French CJ in *Hogan* articulated a broader rule — that the implied freedom conceivably went so far as to embrace 'social and economic features of Australian society' insofar as these are 'matters potentially within the purview of government'.<sup>110</sup> Let us accept for argument's sake that discussion of the courts may fall within French CJ's broader rule. Insofar as the law of scandalising contempt constitutes a law that impinges on the freedom to communicate about such matters, the question then becomes whether this law satisfies the two limbs of the test in *Lange*.<sup>111</sup>

First, 'is ... the object of the law ... compatible with the maintenance of the constitutionally prescribed system of representative and responsible government'?<sup>112</sup> Insofar as the law's object is purportedly ensuring that the judiciary commands the confidence of Australians, it seems that the scandalising offence satisfies this criterion. If nothing else, the existence of the Court of Disputed Returns (as a branch of the judiciary) is essential for the proper operation of elections and of representative government, and that at least in this sense there exists a connection between the courts and representative democracy in Australia.<sup>113</sup>

Second, 'is that the law is reasonably appropriate and adapted to achieving that legitimate object or end'?<sup>114</sup> The majority in *McCloy* clarified that this second-limb analysis involves questions of 'proportionality'.<sup>115</sup> The proportionality of a given measure is assessed by reference to three criteria: suitability (is the measure rationally connected to its purpose?), necessity (is there truly 'no obvious and compelling alternative' to the measure?) and 'adequa[cy] in its balance' (is the gravity of the measure's infringement on political communication justified by the importance of the object it serves?).<sup>116</sup> Put another way, the High Court has held that a 'severe burden ... requires a strong justification',<sup>117</sup> and the burden the scandalising offence places on freedom of expression — exposing criticism of an entire arm of government to unlimited criminal penalties — is severe indeed.

While there can be no doubt that the scandalising offence is rationally connected to its purpose (the offence stipulates that verbal attacks on the judiciary be met with swingeing penalties in order to deter others from making such attacks), the requirements of necessity and balance are less readily satisfied. The question of necessity is

<sup>109</sup> *Australian Capital Television Pty Ltd v Commonwealth* (1992) 177 CLR 106, 232 (McHugh J).

<sup>110</sup> *Hogan v Hinch* (2011) 243 CLR 506, 544 (French CJ).

<sup>111</sup> *Lange v Australian Broadcasting Corporation* (1997) 189 CLR 520, 561–2 ('Lange').

<sup>112</sup> *Lange* (n 111).

<sup>113</sup> See generally *Commonwealth Electoral Act 1918* (Cth) pt XXII.

<sup>114</sup> *Lange* (n 111) 561–2.

<sup>115</sup> *McCloy v New South Wales* (2015) 257 CLR 178, 195 (French CJ, Kiefel, Bell and Keane JJ) ('*McCloy*').

<sup>116</sup> *Ibid.*

<sup>117</sup> *Ibid* 269 (Nettle J).

dealt with in Part IV below; it is concluded that the mischief the scandalising offence seeks to combat (viz, commentary that might sap public confidence in the judiciary) is amply dealt with by other institutional safeguards. For the purposes of the implied freedom, this means that ‘compelling alternative[s]’ exist to the scandalising offence that are both ‘practical’ and which would impinge on the implied freedom to a substantially lesser degree.<sup>118</sup> As such, the offence cannot be said to be ‘necessary’ in the requisite sense.

The question of balance has been considered in other jurisdictions; these considerations provide fruitful suggestions for Australian jurisprudence. In New Zealand, it has been held that the scandalising offence represents a ‘reasonable’ burden ‘upon freedom of expression’ insofar as scandalising contempt purportedly attacks the very foundation of respect for the judiciary upon which that freedom is said to rest.<sup>119</sup> Conversely, in Canada, assessing the scandalising offence against the requirement of proportionality under the *Canadian Charter of Rights and Freedoms*,<sup>120</sup> Goodman JA of the Ontario Court of Appeal suggested that the scandalising offence would ‘not meet the ... test’ absent ‘a clear, significant and imminent ... danger’ to the proper functioning of the judiciary.<sup>121</sup> Justice Cory further suggested that the extent to which the offence relies on the ‘questionable assumption’ that scandalous words will automatically diminish respect for the courts meant that the offence could not be said to have ‘been ‘carefully designed to achieve [its] objective’.<sup>122</sup> This Canadian analysis, it is suggested, is appropriate to adopt pursuant to the *Australian Constitution*. The unbounded character of the penalties that may be imposed on contemnors further weakens the suggestion that the scandalising offence is ‘adequate in [its] balance’.<sup>123</sup> It is essentially at odds with the ideals of liberal democracy to allow a powerful ‘public institution to be exempt from ... public comment’ — a fortiori in an age when it is increasingly the case that judges’ discharge of their function ‘can often amount to nothing less than law-making’, and law-making that may diverge from the will of elected parliaments.<sup>124</sup> Criticism is, ultimately, ‘a central and unavoidable part of the democratic ideal’.<sup>125</sup> Australian judges, like their British counterparts, ‘have had

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<sup>118</sup> *Comcare v Banerji* (2019) 93 ALJR 900, 913; [2019] HCA 23, [35] (Kiefel CJ, Bell, Keane and Nettle JJ) (*‘Comcare’*).

<sup>119</sup> *Solicitor-General (NZ) v Smith* [2004] 2 NZLR 540, 568 (Wild and MacKenzie JJ). See generally *New Zealand Bill of Rights Act 1990* (NZ) s 14.

<sup>120</sup> See generally *Canada Act 1982* (UK) c 11, sch B pt I (*‘Canadian Charter of Rights and Freedoms’*).

<sup>121</sup> *Kopyto* (n 68) 263 (Goodman JA).

<sup>122</sup> *Ibid* 239 (Cory JA).

<sup>123</sup> See *Comcare* (n 118) 914; [39] (Kiefel CJ, Bell, Keane and Nettle JJ).

<sup>124</sup> Michael K Addo, ‘Can the Independence of the Judiciary Withstand Criticism? An Introduction to the Criticism of Judges in Europe’ in Michael K Addo (ed), *Freedom of Expression and Criticism of Judges: A Comparative Study of European Legal Standards* (Ashgate, 2000) 3, 14–15.

<sup>125</sup> *Ibid* 23.

sufficient time to earn the respect and confidence of the public',<sup>126</sup> such that their reputation for competence and probity is not in the balance each time some attack appears in the media — even an attack as ludicrously intemperate as the defendants' in *Oriental Press Group* (where judicial officers were described as 'stupid men and women who suffer from congenital mental retardation', and 'pigs and dogs' whom the defendants were 'determined to wipe ... out').<sup>127</sup>

There is, however, an admitted difficulty with this argument; viz, that there is strong authority for the proposition that communications about judges and the judiciary are not 'political' in such a sense as to fall within the ambit of the implied freedom. Notwithstanding some early Mason Court murmurings that such communications may be protected,<sup>128</sup> the decision in *APLA* has definitively narrowed the scope of the implied freedom in such a way as to largely exclude discussions of judicial conduct.<sup>129</sup> In *APLA*, McHugh J described the implied freedom as a means of safeguarding 'representative and responsible government', and the concomitant imperative of protecting communications pertaining to 'matters relevant to executive responsibility and an informed electoral choice'.<sup>130</sup> In his Honour's view, notwithstanding the sense in which the judiciary is often described as an arm of 'the government', communications about the judiciary cannot be said to bear on that responsibility or that choice, and so cannot be protected by the implied freedom. The particular character of Australian democracy, it is said, compels such a conclusion. In contrast to the situation in many American jurisdictions, Australian judges are not elected to the bench. This being so, it cannot (according to this line of authority) be said that judicial conduct (and commentary thereupon) is 'a manifestation of any of the [constitutional] provisions relating to representative government' from which the implied freedom is derived.<sup>131</sup>

It is true, then, that *most* criticism of the judiciary will not fall within the remit of the constitutional protection provided by the implied freedom of political communication. There is certainly scope to debate the political or philosophical palatability of the line of authority that culminates in *APLA*. In *Popovic*, for instance, Gillard AJA appeared inclined towards a view (albeit without deciding) that commentary on the judiciary is relevantly a form of political communication insofar as 'administration of justice ... is a vital and essential ingredient in the system of government' and

<sup>126</sup> Michael K Addo, 'Scandalizing the Court in England and Wales' in Michael K Addo (ed), *Freedom of Expression and Criticism of Judges: A Comparative Study of European Legal Standards* (Ashgate, 2000) 31, 41.

<sup>127</sup> *Secretary for Justice v The Oriental Press Group Ltd* [1998] 2 HKLRD 123, 137–8 (Chan CJHC and Keith J) (Hong Kong Court of First Instance), affd *Wong Yeung v Secretary for Justice* [1999] 2 HKLRD 293 (Hong Kong Court of Appeal).

<sup>128</sup> See, eg, *Nationwide News Pty Ltd* (n 40) 72 (Deane and Toohey JJ).

<sup>129</sup> *APLA Ltd v Legal Services Commissioner (NSW)* (2005) 224 CLR 322 ('*APLA*').

<sup>130</sup> *Ibid* 361–2.

<sup>131</sup> *John Fairfax Publications v A-G (NSW)* (2000) 181 ALR 694, 709 (Spigelman CJ) (New South Wales Court of Appeal).

that consequently judicial (mis)conduct is a matter that ‘every member of the ... community has a real and legitimate interest in knowing about’.<sup>132</sup>

However, such a debate need not presently detain us, as it can readily be demonstrated that even under the more restrictive view of the implied freedom of political communication enunciated in *APLA*, the scandalising offence as it presently stands is *still* incompatible with that implied freedom. Notwithstanding the trenchancy of the views expressed in these cases, the authorities nevertheless recognise a category of critique of judges and judging that *would* be sheltered by implied freedom; this category is comprised of communications concerning the overlap of the judiciary with the institutions of representative and responsible government in Australia. For present purposes, the most important manifestation of such overlap is in the procedure by which Australian parliaments may remove judges from the bench for misconduct or incapacity.<sup>133</sup> In *Popovic*, Winneke ACJ suggested that, in connection with this parliamentary procedure, speech pertaining to judicial conduct may well constitute ‘discussion on government or political matters in the relevant sense’:

This would particularly be so where the discussion impacts directly or indirectly on the executive government itself; whether in the exercise of its powers to appoint the officer, or in exercising or failing to exercise its powers to initiate the officer’s removal. Such a discussion may well bear the characteristics of one which is capable of informing and shaping the views of the electors about the performance of their elected representatives.<sup>134</sup>

The Full Court of the Supreme Court of South Australia was also prepared to countenance the possibility of discussions of ‘the conduct of a judge’ being protected by the implied freedom if the ‘real thrust’ of the discussion in question was a critique of ‘the conduct, acts or omissions of an elected representative and how that representative is responding to or dealing with the conduct of that judge’.<sup>135</sup> The New South Wales Court of Appeal, however, has suggested that even in situations where a given speaker is ‘in effect, seeking the removal of [a] judicial officer’ by Parliament, communications impugning that judicial officer’s professional conduct (such as some alleged mishandling of a particular case) would nevertheless fall outside the remit of the implied freedom.<sup>136</sup> It is conceded that this would only impinge on a fairly narrow class of communication. However, such speech may nevertheless diminish popular regard for the judiciary, and thereby fall within the purview of the scandalising offence — a reasonable inference from a statement such as ‘Parliament are mad

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<sup>132</sup> *Herald & Weekly Times Ltd v Popovic* (2003) 9 VR 1, 53 (‘*Popovic*’).

<sup>133</sup> *Australian Constitution* s 72; *Australian Capital Territory (Self-Government) Act 1988* (ACT) s 48D; *Constitution Act 1902* (NSW) s 53; *Supreme Court Act 1979* (NT) s 40; *Constitution of Queensland 2001* (Qld) s 61; *Constitution Act 1934* (SA) s 75; *Supreme Court (Judges’ Independence) Act 1857* (Tas) s 1; *Constitution Act 1975* (Vic) s 87AAB; *Constitution Act 1889* (WA) s 55.

<sup>134</sup> *Popovic* (n 132) 10–11 (Winneke ACJ).

<sup>135</sup> *Peek v Channel 7 Adelaide Pty Ltd* (2006) 94 SASR 196, 227 (Besanko J).

<sup>136</sup> *O’Shane v Harbour Radio Pty Ltd* (2013) 85 NSWLR 698, 727 (Beazley P).

for not initiating proceedings to remove Justice Smith from the bench' is that Justice Smith has fallen short of the standard of competence or probity expected of judges, and that any court over which Justice Smith presides ought not to be held in the highest possible esteem. To the extent that such a statement would both scandalise the judiciary and represent a communication in respect of the functioning of Australia's representative system of government, the scandalising offence would operate in a manner fundamentally irreconcilable with the implied freedom of political communication.

A final objection remains. On one view, the very persistence of the scandalising offence in Australia may itself serve as *prima facie* evidence that it is not incompatible with the form of democracy prescribed by the *Australian Constitution*. Such an argument, however, is persuasive only to the extent that Australia as a polity and as a society has remained static over the past century. Yet as the High Court observed in relation to the law of defamation in *Lange*, it is eminently possible for courts to examine the evolution of a given common law doctrine and find that, when the 'varying conditions of society' are taken into account,<sup>137</sup> that doctrine may well fail to meet essential legal criteria that have developed since the doctrine's inception. In the particular situation at issue in *Lange*, the common law rules of qualified privilege in defamation as they then stood were held to no longer be compatible with the requirements for freedom of political communication that the Mason Court had discerned in the *Australian Constitution*. As discussed in Part II above, the social conditions that may have once at least notionally justified savage penal intervention to quell popular criticism of the judiciary no longer obtain in modern Australia. To paraphrase the Court in *Lange*, then, the law of contempt of court should be free to evolve in harmony with that evolution of societal conditions.<sup>138</sup>

## IV REFORM

### *A Abolition*

This article has outlined a number of conceptual and practical difficulties that beset the scandalising offence. The question may well be asked: what ought to be done? This author submits that the only viable means of rationalising the law of contempt is to abolish the scandalising offence by statute, as has been done in the United Kingdom<sup>139</sup> and in New Zealand.<sup>140</sup> This is, as the Privy Council have conceded, an argument with 'considerable force'.<sup>141</sup> The following sections will detail several bases supporting this contention.

<sup>137</sup> *Wason v Walter* (1868) LR 4 QB 73, 93 (Cockburn CJ), quoted in *Lange* (n 112) 570 (Brennan CJ, Dawson, Toohey, Gaudron, McHugh, Gummow and Kirby JJ).

<sup>138</sup> *Lange* (n 111) 571.

<sup>139</sup> *Crime and Courts Act 2013* (UK) s 33; *Criminal Justice Act (Northern Ireland) 2013* (NI) s 12.

<sup>140</sup> *Contempt of Court Act 2019* (NZ) s 26(5).

<sup>141</sup> *Dhooharika* (n 87) 891 (Lord Clarke JSC).

### B *Irony: The Scandalising Offence May in Fact Diminish Respect for the Courts*

There is an irony at the heart of the scandalising offence: by punishing mere statements of opinion ‘as criminal contempts’, ‘the scene’ may well ‘be set for the court to be brought into actual contempt’ amongst the public at large.<sup>142</sup> Prosecuting the offence, in other words, risks having an utterly ‘counter-productive effect’ on popular respect for the courts.<sup>143</sup> In extreme instances, use of the power to punish scandalising contempt — far from safeguarding public confidence in the integrity of the judiciary — can in fact serve to vindicate the contemnor’s criticism. It is a cliché of human experience that if respect — be it for an individual or for an institution — is to have any genuineness or durability it must be earned, rather than simply demanded by the individual or institution *ex nihilo* — ‘[y]ou cannot compel public respect for the administration of justice’.<sup>144</sup> And indeed, Lord Denning once remarked that the courts’ capacity to punish for scandalising contempt ought ‘never [be] use[d] as a means to uphold our own dignity. That must rest on surer foundations’.<sup>145</sup> In 2002, the Booker Prize-winning novelist Arundhati Roy wrote in an affidavit submitted to the Supreme Court of India that the Court displayed a ‘disquieting inclination’ to ‘harass ... those who disagree with it’.<sup>146</sup> Purportedly to prevent Indians from regarding Roy’s criticism as correct, the Court responded by fining and briefly imprisoning her for scandalising contempt<sup>147</sup> — that is, by effectively harassing her for disagreeing with it. Heydon observes that there may have been an irony implicit in the 2017 Victorian ministerial contempt matter discussed earlier: while the objective of the law of contempt ‘is to increase respect for the law’, it is nevertheless very possible that the Victorian Court of Appeal’s conduct in connection with ‘in fact actually engendered less respect for the law’.<sup>148</sup> To Lord Pannick’s mind, an attempt to sue a former cabinet minister for scandalising a Northern Irish judge in fact ‘damaged the reputation of the legal system in Northern Ireland’.<sup>149</sup> Tey, too, has concluded that, far from shoring up public confidence in the due administration of justice, the Singaporean courts’ ‘inflexib[ility] and illiberal[ity]’ in trying scandalising cases have in fact *harmed* the judiciary’s standing in the eyes of the public.<sup>150</sup> There is also the fact that initiating a scandalising prosecution may resurrect from

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<sup>142</sup> *Gallagher* (n 38) 252 (Murphy J).

<sup>143</sup> Law Reform Commission (Australia) (n 69) 264.

<sup>144</sup> *A-G (NZ) v Blomfield* (1913) 33 NZLR 545, 574 (Denniston J).

<sup>145</sup> *Commissioner of Police of the Metropolis* (n 17) 155.

<sup>146</sup> Justice Hosbet Suresh, ‘Contentious Contempt’, *The Times of India* (Mumbai), 16 August 2002, 14. See also Venkat Iyer, ‘The Media and Scandalising: Time for a Fresh Look’ (2009) 60(2) *Northern Ireland Legal Quarterly* 245, 254.

<sup>147</sup> Suresh (n 145) 14.

<sup>148</sup> Heydon (n 18) 17.

<sup>149</sup> United Kingdom, *Parliamentary Debates*, House of Lords, 2 July 2012, vol 738, col 557 (Lord Pannick).

<sup>150</sup> Tey (n 73) 785.

the oblivion created by the ephemeral nature of mass media imputations that had otherwise been forgotten (or not noticed in the first place) by the public.<sup>151</sup>

Moreover, the possibility of facing criminal penalties for critiquing the work of the courts ‘will inevitably deter people from speaking out on perceived judicial errors’.<sup>152</sup> There will be instances in which public confidence in the judiciary *should* be diminished — that is, when judges discharge their functions in a manner that is manifestly incompetent or corrupt, the public should not fear that loudly drawing attention to this fact (and so acting as a spur for positive change) will see them facing prosecution for contempt.<sup>153</sup> Indeed, ‘the only remedy’ for some judicial impropriety or incompetence might well be blunt criticism in a public forum such as the press.<sup>154</sup> In jurisdictions beset by genuine corruption in their judiciaries, the scandalising offence provides a ready ‘instrument to silence honest criticism of biased judges’.<sup>155</sup> Even in a jurisdiction as free of judicial corruption as Australia, there will inevitably be curial sloth and incompetence that ought properly be exposed to public scrutiny; such scrutiny may be impeded by the existence of the scandalising offence.<sup>156</sup>

### C Reformulate the Offence: ‘Real Risk’, Public Figures?

If the offence must be retained, it is submitted that the only instance in which it ought to be used is in matters involving persons of significant public influence, such as when members of the executive directly threaten the judiciary, viz, pose a ‘real risk’ to the administration of justice.<sup>157</sup> Consider *Borowski*, a case from Manitoba. Here, a cabinet minister (Borowski) was sued by a provincial employee. Borowski made an application to the Court to stay the employee’s proceedings, which was dismissed by a magistrate. After the stay application was concluded (when the matter was no longer sub judice), Borowski described the magistrate as biased against him on a party-political basis and threatened to have ‘that bastard ... defrocked and debarred’.<sup>158</sup> As Nitikman J observed, this latter comment was ‘unbelievably outrageous ... coming from the mouth of a Minister of the Queen’ because it constituted ‘an arrogant threat against the independence of the judiciary’, and an ugly

<sup>151</sup> Shimon Shetreet and Sophie Turenne, *Judges on Trial: The Independence and Accountability of the English Judiciary* (Cambridge University Press, 2<sup>nd</sup> ed, 2013) 414.

<sup>152</sup> Pannick (n 22) 9.

<sup>153</sup> See Sophie Turenne, ‘Free Speech and Scandalising the Court in Mauritius’ (2015) 74 *Cambridge Law Journal* 7, 9.

<sup>154</sup> Dyson Heydon, ‘Court in the Crosshairs’, *The Weekend Australian* (Sydney), 29–30 September 2018, 17.

<sup>155</sup> Shetreet and Turenne (n 151) 413.

<sup>156</sup> Heydon (n 18) 16.

<sup>157</sup> See *Ahnee* (n 54) 306 (Lord Steyn); *Shadrake* (n 29) 789–93 (Andrew Phang Boon Leong JA); *Dhooharika* (n 87) 895 (Lord Clarke JSC).

<sup>158</sup> *Re Borowski* (1971) 19 DLR (3d) 537, 540 (Nitikman J) (Court of Queen’s Bench of Manitoba).

reminder of the dark Stuart days of judges' tenure depending on their loyalty to the Crown.<sup>159</sup> To his Honour's mind, that Borowski tendered to the Court a statement that *of course* the government would not *really* seek to have the magistrate 'defrocked and debarred' only aggravated matters: had Borowski not regarded his threat as one 'calculated to ... interfere with the due process of justice' — that is, unless he realised that his threat represented a clear and credible danger to the independence of the judiciary — he would not have felt compelled to provide 'such [an] assurance'.<sup>160</sup> This article argues that it is here that the crucial distinction between remarks made by the likes of Borowski and those made by the likes of the columnist-in-a-gutter-newspaper defendants in *Oriental Press Group*. While the comments of the latter are no doubt more insulting and perhaps even more injurious to the personal feelings of judges, they are in the final analysis the words of a (gutter) newspaper columnist, someone whose ability to actually impair the functioning of the courts is limited to whatever nebulous impact their columns may have on public confidence in those courts. Such commentators are unable to attack judges directly, and are restricted to attacking public confidence, which may or may not yield to their depredations. By contrast, a minister of the Crown actually possesses real political clout with which to directly and effectively attack the judiciary. There is no need to ponder the empirical impact of media commentary (which is, as noted above, difficult to quantify) on 'public confidence' (a slippery concept): the minister has, through the executive's control over judicial appointments, the power to interfere with the integrity of the judiciary in a much more straightforward fashion. With Goodman JA of the Ontario Court of Appeal, this article suggests that it is not so much in the character of the words used (however 'vitriolic') that the true threat to the courts inheres, but rather in the social and political 'standing' of the person uttering them — profoundly savage words from 'a person of no standing in the community' will wreak far less harm than 'polite words ... calculated to bring the administration of justice into disrepute' spilling from the pen or mouth of 'a person of good reputation'.<sup>161</sup> And in that sense, the misuse of the bully pulpit afforded to those in power is far more of a threat than the grumblings (however vituperative) of the private citizen or even the newspaper columnist.

## V IS THE OFFENCE NECESSARY?

### A *A Superfluous Offence?*

This article has argued that, in the struggle to safeguard the administration of justice from harmful public commentary, the scandalising offence is, in the final analysis, superfluous. Instances of public commentary that pose a genuine threat to actual court processes are covered by the other branches of the law of contempt. If vile remarks are directed at particular judges with the intention or effect of damaging that judge's reputation for competence or probity, then those remarks will be actionable

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<sup>159</sup> Ibid 547 (Nitikman J).

<sup>160</sup> Ibid 548 (Nitikman J).

<sup>161</sup> *Kopyto* (n 68) 263–4 (Goodman JA).

in defamation (though it is submitted that such actions ought, as a matter of policy, to be rare). The only field of operation unique to the scandalising offence is thus comments directed to the judiciary at large (that is, not in connection with actual concrete cases before the courts), which in this author's view pose a threat too nebulous to justify the possibility of criminal prosecution. The former Lord Chief Justice of Northern Ireland, a man whose judicial career was marked by 'deeply scandalous assertions' by the media in connection with his decisions in terrorism trials, supported abolition of the scandalising offence notwithstanding the profound hurt such assertions caused him personally: 'judges have to be able to ... shrug their shoulders and get on with it', and even when judges regard some line as having been crossed, 'there are other ways of dealing with it than this offence'.<sup>162</sup> Even in the face of savage attacks on the British judiciary as '[e]nemies of the [p]eople'<sup>163</sup> in connection with Brexit litigation,<sup>164</sup> Lord Neuberger suggested that while 'some of what was said was undermining the rule of law', 'most' of the comments — even those his Lordship 'didn't ... think w[ere] fair' — were 'within the ambit of what a reasonable press could do'.<sup>165</sup> Lord Borrie, author of a leading text on contempt,<sup>166</sup> remarked that the offence 'has a chilling effect on freedom of speech' and that its abolition would cause 'hardly any loss' for the judiciary in practice.<sup>167</sup> As Lord McNally observed in the same debate, the undesirable conduct the offence purports to regulate may readily be dealt with under other heads of contempt, or under other 'criminal offences or civil remedies', such as 'corruption, threat or defamation' such that abolition would leave no discernible 'gap in the law'.<sup>168</sup>

Moreover, the range of other voices that may be raised to rebut irresponsible criticism of the courts further weakens the rationale of the scandalising offence. As discussed above, judges themselves are no longer so squeamish as they once were about entering the media fray to defend themselves and the curial institutions they serve. Attorneys-General, for instance, have historically been charged with the defence of the judiciary, though it may be that this tradition has weakened in recent times.<sup>169</sup> Law societies may also serve as a vehicle for rebutting undue criticism of judges, as

<sup>162</sup> United Kingdom, *Parliamentary Debates*, House of Lords, 2 July 2012, vol 738, col 561 (Lord Carswell).

<sup>163</sup> See, eg, James Slack, 'Enemies of the People: Fury over "out of Touch" Judges Who Defied 17.4m Brexit Voters and Could Trigger Constitutional Crisis', *Daily Mail* (London), 4 November 2016, 1.

<sup>164</sup> See generally *R (Miller) v Secretary of State for Exiting the European Union* [2018] AC 61.

<sup>165</sup> Ian Drury, 'Politicians "Too Slow" to Back Courts over Brexit, Says Top Judge', *Daily Mail* (London), 17 February 2017, 10.

<sup>166</sup> Gordon Borrie and Nigel Lowe, *The Law of Contempt* (Butterworths, 1973).

<sup>167</sup> United Kingdom, *Parliamentary Debates*, House of Lords, 2 July 2012, vol 738, col 559–60 (Lord Borrie).

<sup>168</sup> *Ibid* vol 738, col 564 (Lord McNally).

<sup>169</sup> See, eg, Daryl Williams, 'The Role of the Attorney-General' (2002) 13 *Public Law Review* 252.

may peak legal industry bodies such as Law Council of Australia,<sup>170</sup> though these can sometimes be ‘an unwieldy means of reply’.<sup>171</sup> To the extent that the rationale of the scandalising offence purports to rest on the offence’s function as a sort of sword and shield of the courts, the existence and vigour of these alternative voices diminishes the force of that rationale.

*B Possible but Unsatisfactory Alternative: Judges Suing in Defamation?*

That the discharge of the judicial function may bring down a ‘whole artillery of libels’ has been recognised for centuries;<sup>172</sup> but it has also been said that such ‘[i]nsults are best treated with disdain — save when they are gross and scandalous’.<sup>173</sup> The Family Court considered that while ‘a court may prefer to maintain a dignified silence when under unwarranted attack’,<sup>174</sup> the attractions of such a silence may be outweighed by the imperative of defending the court’s ‘dignity and authority’.<sup>175</sup> For judges who feel they must so defend themselves, the law of defamation may provide some recourse, despite High Court obiter that the notion of a judge suing in defamation is ‘unseemly’.<sup>176</sup> Sir Redmond Barry embodied the traditional attitude when he said that as a ‘representative of the majesty of the law’ it would be ‘unmanly’ and ‘ignoble ... for [judges] to entertain any personal feelings’ in connection with the performance of their official functions.<sup>177</sup> Nevertheless, judges’ ability to do so in connection with comments on their capacity as judicial officers was recently confirmed by the New South Wales Court of Appeal.<sup>178</sup> Shetreet and Turenne remark that actions in defamation by judges are ‘rare and ... should remain so’<sup>179</sup> — though the authors make an exception for matters in which ‘the accusations were so severe that the judges could have been said to be unfit to practise as a result’.<sup>180</sup>

Sir Zelman Cowen suggested that while it may be ‘readily understandable’ why judges are reluctant to sue in defamation, this reluctance is itself no grounds for

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<sup>170</sup> See, eg, Arthur Moses, ‘Unfair Criticism and Sexist Attack on High Court Judges Should Not Be Tolerated’ (Web Page, 25 June 2019) <<https://www.lawcouncil.asn.au/media/media-releases/unfair-criticism-and-sexist-attack-on-high-court-judges-should-not-be-tolerated>>.

<sup>171</sup> Dawson (n 21) 27.

<sup>172</sup> *R v Wilkes* (1770) 4 Burr 2579, 2562; 98 ER 327, 347 (Lord Mansfield CJ).

<sup>173</sup> *Balogh v St Albans Crown Court* [1975] QB 73, 86 (Lord Denning MR).

<sup>174</sup> *Wade* (n 81) 27 (Frederico J).

<sup>175</sup> *Dunbabin* (n 11) (Dixon J), quoted in *ibid*.

<sup>176</sup> *Mann v O’Neill* (1997) 191 CLR 204, 236 (McHugh J).

<sup>177</sup> *Re Syme; Ex parte The Daily Telegraph Newspaper Co Ltd* (1879) 5 VLR 291, 296.

<sup>178</sup> *O’Shane* (n 136) 715 (Beazley P). See also *Re a Special Reference from the Bahama Islands* [1893] AC 138.

<sup>179</sup> Shetreet and Turenne (n 151) 414.

<sup>180</sup> *Ibid* 415.

the retention of a draconian criminal jurisdiction for scandalising contempt.<sup>181</sup> Yet nevertheless, examples of such actions abound. By one estimate, some 10 per cent of libel actions in the United States in 2005 were launched by judicial officers.<sup>182</sup> A New York judge sued the publishers of a book suggesting that his Honour was ‘tough on long-haired attorneys and black defendants ... [b]ut [that] his judicial temper soften[ed] remarkably before ... organized crime figures’.<sup>183</sup> In 2014, a Northern Irish judge sued the *Sunday World* newspaper in response to an article suggesting he was less than impartial in sentencing a Crown prosecutor for traffic offences,<sup>184</sup> while in 2017 a Manhattan judge launched a defamation action against a newspaper that described her judicial style as ‘slow’ and ‘lazy’.<sup>185</sup> In 2007, a Massachusetts judge successfully sued in defamation after a newspaper printed allegations that his Honour had suggested that a teenage rape victim (whose case his Honour had presided over) should ‘get over it’.<sup>186</sup> In 1992, an English judge was awarded damages after an independent arbitrator held that a newspaper had defamed him by suggesting that ‘he nodded off during a murder trial’.<sup>187</sup> And in Australia, one New South Wales magistrate successfully sued a radio broadcaster in defamation for describing her as ‘deliver[ing] the most diabolical and wrong decisions in law’,<sup>188</sup> while a Victorian magistrate took similar (and similarly successful) action against a newspaper columnist who alleged that the magistrate had pre-judged a case in advance of hearing it, had mistreated a police prosecutor ‘for simply arguing the law’ and had ‘hugged two drug traffickers she let go free’.<sup>189</sup>

Such developments are not without their difficulties. It has been repeatedly stated that the scandalising offence exists not for the protection of judges’ personal reputation,

<sup>181</sup> Zelman Cowen, *Sir John Latham and Other Papers* (Oxford University Press, 1965) 99.

<sup>182</sup> Michael D Schoepf, ‘Removing the Judicial Gag Rule: A Proposal for Changing Judicial Speech Regulations to Encourage Public Discussion of Active Cases’ (2008) 93(1) *Minnesota Law Review* 341, 342.

<sup>183</sup> *Rinaldi v Holt, Rinehart & Winston Inc*, 366 NE 2d 1299, 1303 (Jasen J) (New York Court of Appeals).

<sup>184</sup> ‘Judge Settles Libel Action with Sunday World’, *Belfast Telegraph* (online, 13 May 2014) <<https://www.belfasttelegraph.co.uk/news/northern-ireland/judge-settles-libel-action-with-sunday-world-30270946.html>>.

<sup>185</sup> Jason Grant, ‘Manhattan Judge Says Post Articles Were “Attack on the Judiciary”’, *New York Law Journal* (online, 7 September 2017) <<https://www.law.com/newyorklawjournal/sites/newyorklawjournal/2017/09/07/manhattan-judge-says-post-articles-were-attack-on-the-judiciary/>>.

<sup>186</sup> *Murphy v Boston Herald Inc*, 865 NE 2d 746, 750 (Greaney J) (2007) (Supreme Judicial Court of Massachusetts).

<sup>187</sup> Clare Dyer, ‘Judge’s Quickie Libel Sets Example’, *The Guardian* (London), 24 July 1992, 4.

<sup>188</sup> *O’Shane* (n 136) 703 (Beazley P).

<sup>189</sup> *Herald & Weekly Times Ltd* (n 131) 16 (Gillard AJA).

but rather to safeguard the administration of justice on a systemic level.<sup>190</sup> Yet in the decided cases this line has often been blurry indeed: frequently defendants have been hauled before the courts for statements that effectively constituted '[p]ersonal attacks on a judge' in matters not bearing 'directly to his administration of justice' — an issue magnified by the notion that 'maintain[ing] judicial dignity' on an individual level may well be 'an aspect of ... public confidence' in the courts.<sup>191</sup> In this connection, a Manitoban court commented that 'the dignity and majesty of the Courts' was an absolutely foundational component of the due administration of justice — with any harm to the former necessarily impacting 'adversely' on the 'orderly operation' of the latter.<sup>192</sup> It is not easy to cleanly demarcate the boundary 'between the personal dignity of judges and their public roles'<sup>193</sup> — while 'contempt may include defamation', the 'offence is something more than mere defamation, and is of a different character'<sup>194</sup> — and it is submitted that actions in defamation unhelpfully blur this line further, and are best avoided as a matter of policy.

## VI CONCLUSION

The law of contempt plays an invaluable role in safeguarding the due administration of justice. It is possible to use the tools of the modern media to comment on or to interfere with judicial proceedings in a fashion that ought rightly to attract penal sanction: filming Crown witnesses giving evidence in a criminal matter,<sup>195</sup> for instance, or by printing details of jury deliberations.<sup>196</sup> In such cases, it is sometimes necessary to use the force of criminal prosecution to 'to keep the springs of justice undefiled'.<sup>197</sup> But prosecuting commentary on the judiciary in the abstract cannot be justified, save in extraordinary circumstances such as those described above. The offence of scandalising the judiciary must be statutorily abolished. The central role the judiciary plays in a given society means that inevitably courts will become 'the subject of comment and criticism' — and '[n]ot all will be sweetly reasoned'.<sup>198</sup> Yet the intemperance or indeed even the incoherence of some of these criticisms does not demand that the full force of the law be brought against their progenitors — '[j]ustice is not a cloistered virtue',<sup>199</sup> and nor are 'the courts ... fragile

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<sup>190</sup> See, eg, *Dunbabin* (n 11) 442 (Rich J); *Newfoundland Association of Public Employees* (n 80) 328 (Morgan JA).

<sup>191</sup> *Milton* (n 86) 429 (emphasis altered).

<sup>192</sup> *Borowski* (n 158) 547.

<sup>193</sup> Addo, 'Scandalizing the Court in England and Wales' (n 124) 31.

<sup>194</sup> *Banerjee v High Court of Bengal* (1883) 10 IA 171, 179 (Sir Barnes Peacock) (Privy Council).

<sup>195</sup> *Prothonotary of Supreme Court (NSW) v Rakete* (2010) 202 A Crim R 117.

<sup>196</sup> See, eg, *A-G (UK) v Associated Newspapers* [1994] 2 AC 238.

<sup>197</sup> *Grant v DPP (Jamaica)* [1982] AC 190, 200 (Lord Diplock).

<sup>198</sup> *Kopyto* (n 68) 227 (Cory JA). See also Kirby (n 16) 603–4.

<sup>199</sup> *Ambard v A-G (Trinidad and Tobago)* [1936] AC 322, 335 (Lord Atkin).

flowers that ... wither in the hot heat of controversy'.<sup>200</sup> As Sir Zelman Cowen rightly observed, the administration of justice 'is not imperilled by unmannerly, tasteless, intemperate or even unbalanced verbal or written attacks'.<sup>201</sup> And indeed, even if the impugned statements ultimately consist of 'the whining of an unhappy loser', insofar as they are made as part of 'the expression of a sincerely held belief on a matter of public interest', they should not be the subject of contempt proceedings.<sup>202</sup>

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<sup>200</sup> *Kopyto* (n 68) 227 (Cory JA).

<sup>201</sup> Cowen (n 180) 99.

<sup>202</sup> *Ibid* 223–4 (Cory JA).

## ON THE LEGALITY OF MARS COLONISATION

‘Humanity will not remain on the earth forever, but in pursuit of light and space it will at first timidly penetrate beyond the limits of the atmosphere, and then conquer all the space around the sun.’<sup>1</sup>

### ABSTRACT

Recent technological advancements made by governmental agencies and private industry have raised hopes for the future of human space flight beyond the Moon. These advancements are increasing the feasibility of endeavours to establish a permanent human habitat on Mars, as a safeguard for our species, for scientific endeavours, and for commercial purposes. This article analyses some of the legal issues associated with Mars colonisation, focusing on the lawfulness of such a venture and the legal status of colonists.

### I INTRODUCTION

Recent technological advancements made by governmental agencies and private industry have raised hopes for the future of human space flight beyond the Moon. The United States’ National Aeronautics and Space Administration (‘NASA’) is developing a new generation of launch and crew systems that will enable

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\* Surveillance of Space Capability Officer, Royal Australian Air Force; MSc (Physics, Space Operations) RMC Canada. Email: [josh.fitzmaurice@gmail.com](mailto:josh.fitzmaurice@gmail.com). The views expressed in this article are personal views and should not be interpreted as an official position.

\*\* Lecturer, Adelaide Law School, The University of Adelaide; PhD (Adel). Email: [stacey.henderson@adelaide.edu.au](mailto:stacey.henderson@adelaide.edu.au).

<sup>1</sup> Letter from Konstantin Tsiolkovsky to Boris Vorobiev, 12 August 1911. See, eg, Rex Hall and David Shayler, *The Rocket Men: Vostok & Voskhod: The First Soviet Manned Space-flights* (Springer, 2001). Konstantin Tsiolkovsky is often referred to as the ‘father of rocketry’; eg, ‘Konstantin E Tsiolkovsky’, *NASA* (Web Page, 22 September 2010) <<https://www.nasa.gov/audience/foreducators/rocketry/home/konstantin-tsiolkovsky.html>>. Another fitting sentiment from the same letter is that ‘Earth is the cradle of humanity, but one cannot live in a cradle forever’: Hall and Shayler (n 1) 5. This ubiquitous Tsiolkovsky quote is an imprecise translation of the original ‘планета есть колыбель разума, но нельзя вечно жить в колыбели’, which more precisely translates as ‘a planet is the cradle of mind, but one cannot live in a cradle forever’: ‘Konstantin Eduardovich Tsiolkovsky’, *Reality Fiction* (Web Page, <<https://web.archive.org/web/20140219031703/http://www.rf.com.ua/article/388>>).

humans to travel deeper into space than ever before. Private organisations, such as SpaceX and Orbital ATK, are becoming increasingly involved in space activities, largely in collaboration with governmental agencies, creating new equipment and processes required for deep space flight.

The future of humanity in the event of a catastrophic Earth event is an oft cited justification for the establishment of a permanent human habitat on Mars. However, as with many pursuits of this magnitude, the attraction also lies in accomplishing something never before achieved; to be pioneers. While this may be one of the most exciting prospects currently facing humankind, if we are to become a multi-planet species, there are many legal issues that will first need to be considered. Current international space law treaties have not contemplated human habitation beyond the Earth,<sup>2</sup> and are notably silent on what happens when humans dwell among the stars.

Although the human spirit of adventure and discovery will be a great driving force in endeavours to inhabit Mars, so too will economic motivators. Commercial and governmental agencies are already planning missions to mine asteroids for their natural resources; other celestial bodies, including the Moon and Mars, are a natural progression.<sup>3</sup> Whether for the sake of humanity or commercial gain, it seems that endeavours to establish permanent human habitats on celestial bodies, including Mars, will only intensify in the coming decades.

This article begins with an overview of steps taken towards a permanent human habitat on Mars. Highlighting some of the legal issues that arise from such a venture, it first analyses the lawfulness of such an activity and attempts to reconcile this with the principle of non-appropriation in the *Outer Space Treaty*. It then explores the legal status of the inhabitants of a Mars habitat, and some of the legal implications for humans residing beyond the surface of the Earth. The article argues that if humans

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<sup>2</sup> *Treaty on Principles Governing the Activities of States in the Exploration and Use of Outer Space, Including the Moon and Other Celestial Bodies*, opened for signature 27 January 1967, 610 UNTS 205 (entered into force 10 October 1967) ('*Outer Space Treaty*'); *Agreement on the Rescue of Astronauts, the Return of Astronauts and the Return of Objects Launched into Outer Space*, opened for signature 22 April 1968, 672 UNTS 119 (entered into force 3 December 1968) ('*Rescue and Return Agreement*'); *Convention on International Liability for Damage Caused by Space Objects*, opened for signature 29 March 1972, 961 UNTS 187 (entered into force 1 September 1972) ('*Liability Convention*'); *Convention on Registration of Objects Launched into Outer Space*, opened for signature 14 January 1975, 1023 UNTS 15 (entered into force 15 September 1976) ('*Registration Convention*'); *Agreement Governing the Activities of States on the Moon and Other Celestial Bodies*, opened for signature 18 December 1979, 1363 UNTS 3 (entered into force 11 July 1984) ('*Moon Agreement*').

<sup>3</sup> For example, Deep Space Industries, an American company with an ambition to mine asteroids, is perhaps prophetic of what is to come. The company 'believes the human race is ready to begin harvesting the resources of space both for their use in space and to increase the wealth and prosperity of the people on planet Earth': Isabelle Bouvet, 'An International Legal Framework to Govern Space Natural Resources Exploitation' (DPhil Thesis, McGill University, 2012) 6.

are to live among the stars, a change in narrative is needed which better captures and explains human habitation of celestial bodies, and distinguishes this activity from the taint of historical colonisation activities on Earth.

## II TO MARS: THE FUTURE IS ALREADY HERE

The prescient science fiction author William Gibson is attributed to the statement that ‘the future is already here, it’s just not very evenly distributed’.<sup>4</sup> Human habitation of celestial bodies has been a recurring theme within fiction and fantasy.<sup>5</sup> However, true to Gibson’s statement, work to turn fiction into reality has already begun in earnest.

German rocket engineer Werner von Braun outlined the first serious plans for human exploration of Mars in a novel in 1948.<sup>6</sup> Although conceived as a work of fiction to stave off boredom following the end of the V-2 rocket program in the United States, von Braun included detailed and highly precise calculations in the novel’s appendices. The meticulously planned mission was based upon a fleet of 10 spacecraft carrying 70 personnel, recommended for launch in 1965, with an intended 400-day duration on the planet.<sup>7</sup>

Though highly precise, the mission was based upon subsequently disproved scientific theories, including the use of horizontally landing winged spacecraft — a plan that would not succeed in a Martian atmosphere with approximately one percent the surface pressure of that found on Earth.<sup>8</sup> The discovery of the Van Allen radiation belts by the NASA Explorer missions in 1958 would also necessitate changes to the design of von Braun’s spacecraft in order to shield passengers from the harmful effects of exposure to radiation.<sup>9</sup>

NASA has a long history of planned human spaceflight to Mars, including colonisation studies. A Mars expedition study was held in 1960, focusing upon the propulsion mechanisms and orbital trajectories necessary for a round-trip to Mars. These would later form the basis of lunar landings during the Apollo missions during 1963–2.<sup>10</sup> The 1984 ‘Case for Mars II Conference’, partly funded by NASA, included discussion of a permanent Mars base that would serve as a precursor to permanent human

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<sup>4</sup> Pagan Kennedy, ‘William Gibson’s Future is Now’, *The New York Times* (online, 13 January 2012) 8 <<http://www.nytimes.com/2012/01/15/books/review/distrust-that-particular-flavor-by-william-gibson-book-review.html>>.

<sup>5</sup> See, eg, Rob Kitchin and James Kneale, *Lost in Space: Geographies of Science Fiction* (Bloomsbury Publishing, 2005).

<sup>6</sup> Werner von Braun, *The Mars Project* (University of Illinois Press, 1953)

<sup>7</sup> *Ibid.* See also David SF Portree, *Humans to Mars: Fifty Years of Mission Planning, 1950–2000* (NASA History Office, 2001) 2.

<sup>8</sup> *Ibid.* 1.

<sup>9</sup> *Ibid.* 6.

<sup>10</sup> *Ibid.* 5.

habitation.<sup>11</sup> In 2004, then President Bush proclaimed in his ‘Vision for Space Exploration’ that crewed missions to Mars were an important part of the United States’ objective to ‘extend human presence across the solar system’.<sup>12</sup>

In its *NASA Act of 2010*, the United States Government decreed that NASA shall conduct a crewed mission to orbit Mars by the mid-2030s.<sup>13</sup> The *NASA Transition Authorisation Act of 2017* largely maintains the status quo of the 2010 Act, but specifically discusses the ‘requirements of future exploration and utilisation activities leading to human habitation on the surface of Mars’,<sup>14</sup> including ‘the long-term goal of human missions near or on the surface of Mars in the 2030s’.<sup>15</sup> NASA took a step closer to this goal on 26 November 2018, when its Mars InSight probe successfully landed on the surface of Mars.<sup>16</sup> The 2018 budget blueprint released by the Trump administration also reflects a desire to maintain momentum towards Mars exploration: US\$3.7 billion has been allocated to the next generation launch and crew modules needed for deep space exploration (for the Space Launch System and Orion capsule respectively), while a further US\$1.9 billion has been allocated to progress a new Mars rover launch by 2020.<sup>17</sup> In 2015–16, NASA conducted a trial in conjunction with the Russian State Space Corporation, Roscosmos, that saw an astronaut from each state spend one year on the International Space Station (‘ISS’) to study the ‘medical, psychological and biomedical challenges faced by astronauts during long-duration spaceflight’ as a precursor to future Mars missions.<sup>18</sup> Extending the reach of humankind beyond the Moon is clearly an imminent goal of the United States Government.

Other states, although primarily focusing human spaceflight endeavours on lunar missions,<sup>19</sup> are also continuing Mars exploration efforts. Roscosmos is planning lunar landing and uncrewed missions to Mars in 2019, as a precursor to later crewed

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<sup>11</sup> Ibid 63.

<sup>12</sup> George W Bush, ‘A Renewed Spirit of Discovery: The President’s Vision for US Space Exploration’ (Press Release, January 2004) 2 [https://history.nasa.gov/renewed\\_spiritofdiscovery.pdf](https://history.nasa.gov/renewed_spiritofdiscovery.pdf) (‘Vision for US Space Exploration’).

<sup>13</sup> *NASA Authorisation Act of 2010*, Pub L No 111-267, § 301(5), 124 Stat 2805, 2813 (‘*NASA Act of 2010*’).

<sup>14</sup> *NASA Transition Authorisation Act of 2017*, Pub L No 115-10, § 414(b), 131 Stat 18, 34.

<sup>15</sup> Ibid § 432(b)(2)(A), 131 Stat 18, 39.

<sup>16</sup> ‘NASA InSight Lander Arrives on Martian Surface’, *NASA* (Web Page, 26 November 2018) <<https://mars.nasa.gov/news/8392/nasa-insight-lander-arrives-on-martian-surface/?site=insight>>.

<sup>17</sup> ‘America First: A Budget Blueprint to Make America Great Again’, *White House Office of Management and Budget* (Web Page, 2017) 43 <[https://www.whitehouse.gov/sites/whitehouse.gov/files/omb/budget/fy2018/2018\\_blueprint.pdf](https://www.whitehouse.gov/sites/whitehouse.gov/files/omb/budget/fy2018/2018_blueprint.pdf)>.

<sup>18</sup> ‘One-Year Mission: About’, *NASA* (Web Page, 31 January 2017) 1 <<https://www.nasa.gov/lym/about>>.

<sup>19</sup> Igor Komarov, the head of Roscosmos, has stated that ‘NASA has Mars as the priority ... We at this stage are making the Moon our priority. We can be good in rounding each other out and working jointly on this program’: Anton Doroshev and Stepan Kravchenko,

Mars expeditions.<sup>20</sup> China successfully landed a rover on the previously unexplored far side of the Moon on 2 January 2019, and has an uncrewed Mars mission scheduled for 2020, with crewed missions to the Moon and beyond planned in the 2030s.<sup>21</sup> The Indian Space Agency ('ISRO') successfully inserted a spacecraft into Mars orbit in 2014, with the nation's first human spaceflight slated for launch by 2022.<sup>22</sup> The joint European Space Agency ('ESA') and Roscosmos' ExoMars mission remains on-track for a 2020 launch that will see an ESA rover transported to the Martian surface, despite the first lander crashing in 2016.<sup>23</sup> In February 2017, the United Arab Emirates unveiled its Mars 2117 project, which aims to 'establish the first inhabitable human settlement in Mars by 2117',<sup>24</sup> building upon its Mars Probe mission which aims to send the 'Arab world's first spacecraft to the Red Planet in a scientific exploration mission that will land on planet in 2021'.<sup>25</sup>

Despite these efforts by states, it is the private sector that has emerged as a leader in pursuing human space flight to Mars. SpaceX, a private space manufacturing and launch company founded by Elon Musk, is the most notable example. At the September 2016 International Astronautical Congress in Mexico, Musk unveiled plans to develop an Interplanetary Transport System, with the ultimate goal of 'making humans a multi-planetary species'.<sup>26</sup> These aspirations were further refined in 2018, with the announcement of plans to develop Starship and Super Heavy,

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'Russia Sets Out Moon Landing Ambition, Leaves Mars Plans to NASA', *Bloomberg* (online, 26 June 2015) 3 <<https://www.bloomberg.com/news/articles/2015-06-26/russia-sets-out-moon-landing-ambition-leaves-mars-plans-to-nasa>>.

<sup>20</sup> William Atkins, 'Manned Mission to Moon in Russia's Future', *IT Wire* (online, 3 September 2007) <<http://www.itwire.com/content/view/14267/1066/>>.

<sup>21</sup> Stephen Clark, 'Chinese Rover Begins Exploring Far Side of the Moon', *Spaceflight Now* (online, 5 January 2019) <<https://spaceflightnow.com/2019/01/05/chinese-rover-begins-exploring-far-side-of-the-moon/>>.

<sup>22</sup> Pallava Bagla, 'Is India Ready to Send Someone to Space?', *BBC News* (online, 22 August 2018) <<https://www.bbc.com/news/world-asia-india-45243908>>.

<sup>23</sup> 'Schiaparelli Landing Investigation Makes Progress', *European Space Agency* (Web Page, 23 November 2016) <[http://www.esa.int/Our\\_Activities/Human\\_Spaceflight/Exploration/ExoMars/Schiaparelli\\_landing\\_investigation\\_makes\\_progress](http://www.esa.int/Our_Activities/Human_Spaceflight/Exploration/ExoMars/Schiaparelli_landing_investigation_makes_progress)>. It was determined that although most guidance and navigation systems performed as expected, an erroneous signal from the Inertial Measurement Unit shortly following parachute deployment led to the navigation system determining that the lander had negative altitude, despite still being approximately 3.7 kilometres above the Martian surface. This led to early release of the deployed parachute, resulting in a terminal crash. See also 'The ExoMars Programme 2016–2020', *European Space Agency* (Web Page, 1 January 2019) <<http://exploration.esa.int/mars/46048-programme-overview/>>.

<sup>24</sup> 'Mars 2117 Project', *UAE Federal Ministry* (Web Page, 24 September 2019) <<https://government.ae/en/more/uae-future/2030-2117>>.

<sup>25</sup> 'VP, Mohamed bin Zayed Unveil "Mars 2117 Project"', *Emirates News Agency* (online, 14 February 2017) <<http://wam.ae/en/details/1395302597763>>.

<sup>26</sup> 'Making Humans a Multiplanetary Species', *SpaceX* (Web Page, 20 December 2018) <<http://www.spacex.com/mars>>.

a new spaceship and rocket respectively, that will be designed to carry as many as 100 people between planets.<sup>27</sup> SpaceX envisages that transportation to Mars will not be one-way, but will return to Earth (or Earth orbit). This was indeed the plan briefed by Musk during his September 2016 Mars colonisation conference, where he stated that customers would be offered one-way and return trips.<sup>28</sup>

SpaceX's rocket technology is founded upon the basis of re-usability, such that operational costs are reduced to the point of making space travel feasible and accessible to more than just the world's wealthiest. As Byers has observed,

getting to space used to involve building the equivalent of a Boeing 787 and discarding it after a single three-minute flight. The rocket constituted 99 percent of the cost of a launch; that cost can now be spread over multiple missions.<sup>29</sup>

Using the Interplanetary Transport System, Musk envisages up to 1,000 spacecraft leaving Earth every 26 months, enabling a permanent human presence on Mars of 1 million people within 40 to 100 years.<sup>30</sup> SpaceX took an historic step toward its goal on 30 March 2017, when it successfully launched and landed one of its Falcon 9 rockets that had been used for a previous space launch. This marked the first time an orbital class booster had ever been reused, providing an economic basis for SpaceX's future deep space plans.<sup>31</sup> Further progress was made on 3 December 2018, when SpaceX launched and landed the same Falcon 9 booster for a third time.<sup>32</sup> SpaceX is not alone in its ambitions, with other private companies, such as Blue Origin,<sup>33</sup> also having plans for increased human spaceflight to the Moon, Mars and beyond, either independently or in partnership with state space agencies.<sup>34</sup>

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<sup>27</sup> Ibid.

<sup>28</sup> Ibid.

<sup>29</sup> Michael Byers, 'Elon Musk, President of Mars?', *Washington Post* (online, 22 January 2016) <[https://www.washingtonpost.com/opinions/elon-musk-president-of-mars/2016/01/22/732f1520-bfc7-11e5-bcda-62a36b394160\\_story.html?utm\\_term=.1bcef48fb241](https://www.washingtonpost.com/opinions/elon-musk-president-of-mars/2016/01/22/732f1520-bfc7-11e5-bcda-62a36b394160_story.html?utm_term=.1bcef48fb241)>.

<sup>30</sup> SpaceX (n 26).

<sup>31</sup> 'SES-10 Mission', *SpaceX* (Web Page, 30 March 2017) <<http://www.spacex.com/press/2017/03/30/ses-10-mission>>.

<sup>32</sup> 'Spaceflight SSO-A: SmallSat Express Mission', *SpaceX* (Web Page, 3 December 2018) <<https://www.spacex.com/news/2018/12/03/spaceflight-sso-smallsat-express-mission>>.

<sup>33</sup> Kenneth Chang, 'Jeff Bezos Unveils Blue Origin's Vision for Space, and a Moon Lander', *The New York Times* (online, 9 May 2019) <<https://www.nytimes.com/2019/05/09/science/jeff-bezos-moon.html>>.

<sup>34</sup> Jon Fingas, 'Jeff Bezos Outlines Blue Origin's Space Colony Ambitions', *Engadget* (online, 27 May 2018) <<https://www.engadget.com/2018/05/27/jeff-bezos-outlines-blue-origin-space-colony-ambitions/>>.

The presence of a permanent population of humans on Mars (or other celestial bodies) raises numerous legal issues; these must be considered and addressed prior to the arrival of the first crewed mission.

### III THE LEGALITY OF HUMAN HABITATS ON MARS

The term ‘colonisation’ is often used to reference endeavours to establish human habitats on Mars and other celestial bodies. However, the term ‘colonisation’ itself taints these ventures with the negative memory of historical European colonialism. Indeed, the use of terminology such as ‘colony’ and ‘colonist’ suggests that the future Mars habitat will be territory belonging to an Earth state. However, the terrestrial rules for acquiring new territory, such as the discovery of terra nullius or the exercise of sovereign authority, are explicitly prohibited in outer space by international space law. Rather than being terra nullius — territory belonging to no-one — outer space is *res communis*, the common property of all humanity, and states are thus not able to acquire or appropriate any part of outer space, including celestial bodies:

The [space law] treaties were perhaps one of the first real attempts at establishing a global community that would work together to accomplish a goal. Space would not be divided up, as were the land masses on earth, through conquest and colonisation. Rather, the vision for space was one of humans working in harmony to better the lives of all mankind by exploring and possibly exploiting space resources for the good of all, in the spirit of cooperation and harmony.<sup>35</sup>

The challenge then becomes how to reconcile this principle of non-appropriation with endeavours to establish a permanent human habitat beyond the surface of the Earth.

#### A *The Principle of Non-Appropriation*

The *Outer Space Treaty* provides the legal foundation for all activities in outer space. All current spacefaring states are party to the *Outer Space Treaty*.<sup>36</sup> Article I allows states parties to ‘use’ outer space, which at first glance would include the use by humans of Mars as a place to live, provided the habitat was operated for the ‘benefit and interests of all countries’.<sup>37</sup> However, the *Outer Space Treaty* also provides that outer space ‘shall be the province of all mankind’<sup>38</sup> and that ‘celestial bodies [are]

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<sup>35</sup> Heidi Keefe, ‘Making the Final Frontier Feasible: A Critical Look at the Current Body of Outer Space Law’ (1995) 11(2) *Computer & High Technology Law Journal* 345, 346.

<sup>36</sup> As at 1 January 2019, the *Outer Space Treaty* (n 2) has been ratified by 109 states, and signed by a further 23 states: Legal Subcommittee on the Peaceful Uses of Outer Space, *Status of International Agreements Relating to Activities in Outer Space as at 1 January 2019*, 58<sup>th</sup> sess, UN Doc A/AC.105/C.2/2019/CRP.3 (1 April 2019) [10].

<sup>37</sup> *Outer Space Treaty* (n 2) art I.

<sup>38</sup> *Ibid.*

not subject to national appropriation'.<sup>39</sup> The legality of any human habitat on Mars depends then on whether it can be established consistently with these legal principles.

The principle of non-appropriation contained in Article II of the *Outer Space Treaty* provides that '[o]uter space, including the moon and other celestial bodies, is not subject to national appropriation by claim of sovereignty, by means of use or occupation, or by any other means'.<sup>40</sup> It is arguably a principle of customary international law, having received widespread acceptance and representing state practice for more than 50 years. This means that outer space is a global commons, and no state can exercise legal control over any of part of outer space, including celestial bodies, as if it were that state's legal territory.<sup>41</sup> While the term 'celestial bodies' is not defined in any of the space law treaties, the International Astronomical Union adopted definitions in 2006 which recognise the following as 'celestial bodies': the Sun; the planets; the Moon of Earth and the moons of other planets; near-Earth objects; dwarf planets; trans-Neptunian objects; asteroids, comets; and Kuiper belt objects.<sup>42</sup>

States may 'land spacecraft on celestial bodies, collect materials, and leave equipment behind, [however] none of these actions extends or enhances their rights over any part of that body'.<sup>43</sup> Indeed, the *Outer Space Treaty* specifically recognises the right to establish facilities, stations, and other installations in the exploration of space and celestial bodies.<sup>44</sup> Although, as von der Dunk and Tronchetti observe, 'unlike the continents and seas [colonised] by European empires and their navies in previous centuries, outer space, including the Moon and all other celestial bodies, is not subject to national appropriation'.<sup>45</sup> While there is disagreement amongst scholars

<sup>39</sup> *Outer Space Treaty* (n 2) art II.

<sup>40</sup> Ibid. The principle of non-appropriation was among the earliest declarations at the beginning of the space age, being adopted unanimously by the General Assembly in 1961: *International Cooperation in the Peaceful Uses of Outer Space*, GA Res 1721 (XVI), UN Doc A/RES/1721 (XVI) (20 December 1961).

<sup>41</sup> *Outer Space Treaty* (n 2) art II. See also, Carla Sharpe and Fabio Tronchetti, 'Legal Aspects of Public Manned Spaceflight and Space Station Operations' in Frans von der Dunk and Fabio Tronchetti (eds), *Handbook of Space Law* (Edward Elgar, 2017) 627; Melissa de Zwart, 'I've Always Wondered: Could Someone Take Ownership of a Planet or a Moon?' *The Conversation*, (online, 22 August 2018) <<https://theconversation.com/ive-always-wondered-could-someone-take-ownership-of-a-planet-or-a-moon-101464>>.

<sup>42</sup> International Astronomical Union, *Definition of a Planet in the Solar System*, RES/B5, 24 August 2006. See also Leslie I Tennen, 'Enterprise Rights and the Legal Regime for Exploitation of Outer Space Resources' (2016) 47(2) *The University of the Pacific Law Review* 281, 284.

<sup>43</sup> Karl Leib, 'State Sovereignty in Space: Current Models and Possible Futures' (2015) 13(1) *Astropolitics* 1, 6.

<sup>44</sup> *Outer Space Treaty* (n 2) art IV.

<sup>45</sup> Frans von der Dunk, Susan Perlman and Fabio Tronchetti (eds), *Handbook of Space Law* (Edward Elgar, 2017) 5.

about whether this prohibition also extends to appropriation of mineral resources on celestial bodies,<sup>46</sup> the principle of non-appropriation clearly precludes any possibility of states expanding their territory through planetary exploration and the establishment of extraterrestrial human habitats.

Any human habitat on Mars, or any other celestial body, will thus be established in an environment where the rules relating to state sovereignty do not apply in the same way as they do on Earth. However, this is not the same thing as a law-free environment, as there will still need to be legal principles and rules governing a human habitat on Mars. One of the key issues that will need to be resolved before the first human habitat is established is who, in the absence of a responsible sovereign state, will be responsible for the ongoing operation of the habitat and maintaining the security and safety of its inhabitants. The answer to this question depends on whether and how the international community is able to resolve the complex issue of how property rights would operate in a permanent human habitat in outer space.

Traditional terrestrial understandings of property rights will not apply to a human habitat on Mars. A distinction needs to be drawn between space objects, over which states retain jurisdiction and control pursuant to Article VIII of the *Outer Space Treaty*, and the surface of Mars on which those objects are located. For property rights to be granted, there needs to be someone (usually the state) with the power to grant those rights. If no-one can own outer space, then there is no-one who can grant these property rights, despite attempts by some on Earth to purportedly sell land on the Moon and Mars, and lay claim to orbits.<sup>47</sup> While inhabitants, their states or private companies may be able to own a habitat, pod, or base on Mars, they would not be able to own the land on which it was located.<sup>48</sup>

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<sup>46</sup> See, eg, Fabio Tronchetti, 'Legal Aspects of Space Resource Utilisation' in Frans von der Dunk and Fabio Tronchetti (eds), *Handbook of Space Law* (Edward Elgar, 2015) 769; Andrew Brearly, 'Mining the Moon: Owning the Night Sky?' (2006) 4(1) *Astropolitics* 59; Tennen (n 42). Cf the expansion of the principle of non-appropriation in art 11 of the *Moon Agreement* (n 2) which expressly provides that no part of the Moon, its surface, subsurface, nor resources in place, shall become property of any governmental or non-governmental entity, including natural persons. It requires that states undertake to establish an international regime to govern the exploitation of the resources of the Moon, as such exploitation is nigh feasible.

<sup>47</sup> An organisation called 'The Lunar Embassy', founded by Dennis Hope, has purportedly sold in excess of two million plots of land on the Moon and nearly 1 million plots of land on Mars. See 'The Galaxy Can Be Yours', *Lunar Embassy* (Web Page) <<https://www.lunarembassy.com/>>. Note also the *Bogotá Declaration*, under which a group of equatorial developing states (Ecuador, Colombia, Brazil, Congo, Zaire, Uganda, Kenya, and Indonesia) asserted their sovereignty over the equatorial geosynchronous space: International Telecommunication Union, *Declaration of the First Meeting of the Equatorial Countries*, ITU Doc WARC-BS 81-E (3 December 1976) ('*Bogotá Declaration*').

<sup>48</sup> On the 'tragedy of the commons' in the context of outer space, see Scott J Shackelford, 'The Tragedy of the Common Heritage of Mankind' (2009) 28 *Stanford Environmental Law Journal* 109.

Some scholars have suggested that quasi-proprietary rights could apply in outer space,<sup>49</sup> however terrestrial property law is not easily transposable to the outer space environment. As Collins notes, the

simple delineation between equipment and land may be difficult to draw on Mars ... because the planet's atmosphere necessitates artificial construction, such as a greenhouse, in order to render the surface agriculturally productive or habitable ... there is a strong risk that an investment such as a base that possibly costs billions of dollars in preparation and transportation would become public property once it was placed on the planet's surface.<sup>50</sup>

What does this mean for inhabitants who could find themselves occupying their habitat or pod in a perfect location, only to be pushed out of the way for others to secure access to minerals below the surface of Mars, or merely to secure a better view? If there are no ownership rights over the surface of Mars, then there may be little that can be done in response. Such a 'free for all' without any rules would lead to conflict amongst inhabitants, or between inhabitants and private companies, and would not bode well for the long-term future of the Mars habitat.

It is imperative that some form of legal regulation of property be considered and resolved in order to clarify the rights that various actors will have on Mars, in order to ensure that the risk of conflict between inhabitants is diminished, and to promote and encourage the considerable investment that will be required to establish a human habitat in outer space. While some scholars have suggested that property rights on celestial bodies could be awarded to the first possessor,<sup>51</sup> such a first possessor regime would be contrary to the principle of non-appropriation and the *res communis* status of celestial bodies. A regime based on cooperation, however, provides a useful model for how a human habitat on Mars could operate consistent with the current international space law treaties. Indeed, as Wijkman observes the 'interdependence' of all actors in space provides 'strong incentives' for cooperative solutions.<sup>52</sup>

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<sup>49</sup> See, eg, Kurt Anderson Baca, 'Property Rights in Outer Space' (1993) 58(4) *Journal of Air Law & Commerce* 1041, 1065; Brandon C Gruner, 'A New Hope for International Space Law: Incorporating Nineteenth Century First Possession Principles into the 1967 Space Treaty for the Colonisation of Outer Space in the Twenty-First Century' (2004) 35(1) *Seton Hall Law Review* 299.

<sup>50</sup> David Collins, 'Efficient Allocation of Real Property Rights on the Planet Mars' (2008) 14(1) *Boston University Journal of Science & Technology Law* 201, 205.

<sup>51</sup> Ryan Hugh O'Donnell, 'Staking a Claim in the Twenty-First Century: Real Property Rights on Extra-Terrestrial Bodies' (2007) 32(3) *University of Dayton Law Review* 461.

<sup>52</sup> See Magnus Wijkman, 'Managing the Global Commons' (1982) 36(3) *International Organization* 535.

### B *A Cooperative Regime?*

The ISS operates under the principle of international cooperation,<sup>53</sup> and provides a useful model for the establishment and operation of a human habitat on Mars. The ISS *Intergovernmental Agreement* provides ‘for unique solutions’ to issues of intellectual property rights, criminal jurisdiction, and the ‘extended inter-party waiver of liability and the fundamental application of the concept of time-sharing in terms of usage of the manned facilities part of the ISS’.<sup>54</sup> The legal rules and principles that govern the ISS significantly expand the provisions of the international space law treaties ‘in order to provide a legal framework capable of adequately addressing the specific issues resulting from human activities on board a manned station orbiting in low earth orbit’.<sup>55</sup>

Prior to the establishment of the ISS, there were single-state operated space stations,<sup>56</sup> which remained within the jurisdiction of their state of registry under the *Registration Convention*.<sup>57</sup> Indeed, this was the legal position of the Soviet Union’s space station, the Mir, where the Union was entitled to exercise its jurisdiction on board on a quasi-territorial basis.<sup>58</sup> As such, for all legal purposes, these single-state owned space stations comprised a piece of ‘quasi-territory in the global commons of outer space’.<sup>59</sup> The ISS, however, was different both operationally and legally, and required the establishment of new rules and principles for its operation.

Unlike the earlier single-state space stations, the ISS is a modular space station, consisting of several elements which were assembled in space at different times. Building the ISS required the cooperation of multiple states who needed to agree on the design, assembly and operation of the ISS. A human habitat on Mars is likely to be built in a similar way, with many states and private companies contributing to

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<sup>53</sup> The ISS was first established through a 1988 Intergovernmental Agreement: *Agreement Among the Government of the United States of America, Governments of Member States of the European Space Agency, the Government of Japan, and the Government of Canada on Cooperation in the Detailed Design, Development, Operation, and Utilization of the Permanently Manned Civil Space Station*, opened for signature 29 September 1988 (entered into force 30 January 1992). This was superseded by the 1998 Intergovernmental Agreement: *Agreement Among the Government of Canada, Governments of Member States of the European Space Agency, the Government of Japan, the Government of the Russian Federation, and the Government of the United States of America Concerning Cooperation on the Civil International Space Station*, opened for signature 29 January 1998, TIAS No 12927 (entered into force 27 March 2001) (*‘Intergovernmental Agreement’*).

<sup>54</sup> Sharpe and Tronchetti (n 41) 660.

<sup>55</sup> Ibid 619.

<sup>56</sup> Ibid 621; the Soviet Union launched the first space station, Salyut-I, in 1971. This was followed in 1973 by the United States’ Skylab Space Station.

<sup>57</sup> *Registration Convention* (n 2) art II.

<sup>58</sup> Sharpe and Tronchetti (n 41) 622.

<sup>59</sup> Ibid.

the design, build and operation. Indeed, the NASA Administrator, Charlie Bolden, has stated that '[a]ny mission to Mars is likely to be a global effort'.<sup>60</sup> Building on the legacy of the ISS, the human habitation of Mars could be undertaken as an internationally cooperative endeavour under some form of agreement between participating states and private companies. The agreement would need to reflect the inherently collaborative nature of such endeavours, and it is suggested that governance of the habitat should be based on contribution and participation in the venture. Such an agreement would need to address a range of issues, such as the behaviour of inhabitants, ongoing financial support for the habitat, liability, and intellectual property rights for inventions created in the Mars habitat.

Similar to the ISS, a future permanent human habitat on Mars is likely to result in the development of a *sui generis* regime, building on existing international space law. With creative solutions, consistent with existing international space law, that deal with the specific issues that will arise in relation to the establishment and operation of an extraterrestrial human habitat, a legal arrangement could be developed that governs a human habitat on Mars in the spirit of international cooperation and the future of humanity. A collaborative agreement, provided it is consistent with obligations under international space law, would avoid the problems inherent in 'unilateral settlement schemes and the almost inevitable conflicts such models would likely entail'.<sup>61</sup>

#### IV THE LEGAL STATUS OF HUMANS LIVING OFF-EARTH

'That makes me a pirate! A space pirate!'<sup>62</sup>

The presence of humans living in extraterrestrial habitats raises significant questions relating to the legal status of such individuals. One of the key issues that will need to be resolved is whether every human beyond Earth's atmosphere will be classified as an 'astronaut' and thus be entitled to the special protections accorded to astronauts

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<sup>60</sup> Ibid 659.

<sup>61</sup> James Clay Moltz, 'Toward Cooperation or Conflict on the Moon? Considering Lunar Governance in Historical Perspective' (2009) 3(3) *Strategic Studies Quarterly* 82, 93.

<sup>62</sup> Andy Weir, *The Martian* (Random House, 2011) 206; see also *The Martian* (Ridley Scott, 2015). This quote from the fictional character Mark Watney, an astronaut inadvertently abandoned on Mars, was based upon his conclusion that Martian territory outside of buildings was international waters. Although the quote has garnered much attention from international lawyers due to the numerous errors contained within, it is nonetheless a fascinating insight into the complexities and uncertainties of international law as it applies to activities in space. See, eg, Phil Steinberg, 'The Martian, Matt Damon, and Outer Space Law' (Blog Post, 7 November 2015) <<https://www.philsteinberg.wordpress.com/2015/11/07/the-martian-matt-damon-and-outer-space-law>>.

in the space law treaties.<sup>63</sup> Another key issue relates to citizenship of humans living permanently in a human habitat on Mars or other celestial body.

Article V of the *Outer Space Treaty* designates astronauts as the ‘envoys of mankind in outer space’ and obliges states to ‘render all possible assistance’ to astronauts in emergency situations, regardless of their state of origin or nationality.<sup>64</sup> The *Rescue and Return Agreement* is a little broader in the special treatment accorded, using both the terms ‘astronauts’<sup>65</sup> and ‘personnel of a spacecraft’.<sup>66</sup> Both treaties impose obligations on states parties to assist astronauts and return them promptly to the flag state of their spacecraft. However, neither treaty provides a definition of ‘astronaut’ or ‘personnel of a spacecraft’, which raises questions about whether humans living permanently off-Earth, or those en route to a human habitat on Mars or other celestial body, will be ‘astronauts’ or ‘personnel of a spacecraft’ and thus entitled to such special treatment. While the *Moon Agreement* provides that ‘any person’ on the Moon is to be regarded as an ‘astronaut’ by states parties,<sup>67</sup> this treaty has not been widely accepted and, as at 8 January 2019, has only 18 parties, none of which are major space faring states,<sup>68</sup> calling this expansive definition of ‘astronaut’ into question.

Interpretation of the terms ‘astronaut’ and ‘personnel of a spacecraft’,<sup>69</sup> might suggest that individuals falling within these categories have had some specialised training, an operational role in the flight, or a similar function. Indeed, Article V of the *Outer Space Treaty* requires them to be regarded as the ‘envoys of mankind’ which would seem to require some level of public function to be classed as an ‘astronaut’. The *ISS Principles Regarding Processes and Criteria for Selection, Assignment, Training and Certification of ISS (Expedition and Visiting) Crewmembers* distinguish between

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<sup>63</sup> On the question of the legal status of space tourists see, eg, Steven Freeland, ‘Up, Up and ... Back: The Emergence of Space Tourism and its Impact on the International Law of Outer Space’ (2005) 6(1) *Chicago Journal of International Law* 1; Frans von der Dunk, ‘Space for Tourism? Legal Aspects of Private Spaceflight for Tourist Purposes’ (2007) *Proceedings of the Forty-Ninth Colloquium on the Law of Outer Space* 18; CE Parson, ‘Space Tourism: Regulating Passage to the Happiest Place off Earth’ (2006) 9(2) *Chapman Law Review* 493.

<sup>64</sup> *Outer Space Treaty* (n 2) art V.

<sup>65</sup> *Rescue and Return Agreement* (n 2) preamble.

<sup>66</sup> *Ibid* arts 1–4.

<sup>67</sup> *Moon Agreement* (n 2) art 10.

<sup>68</sup> As at 8 January 2019, the *Moon Agreement* (n 2) had 18 states parties and had been signed, but not ratified, by a further four states (France, Guatemala, India, and Romania). The 18 states parties are: Armenia, Australia, Austria, Belgium, Chile, Kazakhstan, Kuwait, Lebanon, Mexico, Morocco, Netherlands, Pakistan, Peru, Philippines, Saudi Arabia, Turkey, Uruguay, and Venezuela. See ‘Status of the Agreement Governing the Activities of States on the Moon and Other Celestial Bodies’, *United Nations Treaty Collection* (Web Page) <[https://treaties.un.org/Pages/ViewDetails.aspx?src=IND&mtdsg\\_no=XXIV-2&chapter=24&clang=\\_en](https://treaties.un.org/Pages/ViewDetails.aspx?src=IND&mtdsg_no=XXIV-2&chapter=24&clang=_en)>.

<sup>69</sup> *Vienna Convention on the Law of Treaties*, opened for signature 23 May 1969, 1155 UNTS 331 (entered into force 27 January 1980) art 31.

a professional astronaut (or cosmonaut) and a spaceflight participant, which would support the interpretation of 'astronaut' and 'personnel of a spacecraft' as requiring something more than mere presence in outer space.<sup>70</sup> Perhaps on the initial voyage to establish the human habitat on Mars all onboard the spacecraft will be regarded as 'astronauts' or 'personnel of a spacecraft', when it is imagined that a small group with very specific roles will be involved. But what about further into the future, when the technology has developed further and there are individuals who are simply along for the ride? It is hard to see the public function served by individuals who have no role in the mission of the spacecraft, hence it is arguable that they are not 'astronauts' or 'personnel of a spacecraft', merely passengers entitled to no additional special protections by international space law.

One implication of this interpretation for humans living permanently off-Earth could be that there is no obligation on astronauts of other states to render assistance to or rescue those individuals who are not 'astronauts' or 'personnel of a spacecraft' in the event of an emergency either en route to, or while in, a human habitat on Mars. Indeed, Article 2 of the *Rescue and Return Agreement* imposes the obligation to rescue and render assistance to 'personnel of a spacecraft' only where they land in territory under the jurisdiction of a state party. This would not extend to an obligation to rescue and render assistance to an extraterrestrial human habitat, as such a habitat cannot be the territory of a state as a consequence of the operation of the principle of non-appropriation. The special protections provided to 'astronauts' and 'personnel of a spacecraft' are not fit for the situation of humans residing permanently off-Earth.

Another legal consideration that arises in relation to humans living extraterrestrially is whether they retain citizenship of their origin states, or whether they would become citizens of Mars. This issue becomes more complex when considering the situation of children born in a human habitat on Mars. Article 7(1) of the *Convention on the Rights of the Child* provides, among other things, that all children 'shall have the right to acquire a nationality'.<sup>71</sup> The issue of citizenship is something that needs to be resolved before any human children are born on Mars, or any other celestial body.

Here too the ISS can provide a useful starting point. Under the *Intergovernmental Agreement*, states retain jurisdiction, including criminal jurisdiction, over their nationals participating in ISS missions.<sup>72</sup> This is consistent with the *Outer Space Treaty* which provides that states retain jurisdiction over personnel of any spacecraft

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<sup>70</sup> 'Principles Regarding Processes and Criteria for Selection, Assignment, Training and Certification of ISS (Expedition and Visiting) Crewmembers', *ISS Multilateral Crew Operations Panel* (Web Page, November 2001) <[www.spaceref.com/news/viewsr.html?pid=4578](http://www.spaceref.com/news/viewsr.html?pid=4578)>.

<sup>71</sup> *Convention on the Rights of the Child*, opened for signature 20 November 1989, 1577 UNTS 3 (entered into force 2 September 1990) art 7(1). This convention has been nearly universally ratified and is binding on all states, except the United States of America; the only state yet to ratify it.

<sup>72</sup> *Intergovernmental Agreement* (n 53) arts 5 and 22.

launched under their registry.<sup>73</sup> Drawing on the model of international cooperation provided by the ISS, an agreement for governance of the human habitat on Mars should specifically consider and address the issue of citizenship, both for those leaving Earth to reside permanently off-Earth, and for those children born off-Earth. It should also specifically address the obligation to rescue inhabitants or contribute to a rescue operation in the event of an emergency in the Martian human habitat.

## V THE PATH FORWARD

‘We are standing at the threshold of a new era. Human colonisation on other planets is no longer science fiction. It can be science fact ... If humanity is to continue for another million years, our future lies in boldly going where no-one else has gone before.’<sup>74</sup>

In 1958, the Australian delegate to the First Committee of the United Nations General Assembly stated that ‘[e]xperience in Antarctica may suggest how difficult it may become to consider the problems of outer space impartially and on a universal plane if decision is left until states have established themselves permanently in the field’.<sup>75</sup> Ehrenfreund and Peter argue that we have already entered the era of ‘Space Exploration 3.0’, where a mix of state and private actors ‘will forge a global space endeavour that is “international, human-centric, transdisciplinary and participatory”’.<sup>76</sup> As endeavours to establish a permanent human habitat on Mars, and other celestial bodies, intensify in the coming decades, it is critical that a legal framework for such activities is developed, which is consistent with existing obligations under international space law.

The ISS and its principle of cooperation provides a successful model on which a legal framework for the establishment and operation of permanent human habitats on Mars and other celestial bodies can be based. The ISS project ‘has shown that governments can collaborate on technological, financial, political and legal levels to produce successful projects that provide for the benefit of all with little dispute and operational difficulty’.<sup>77</sup> As von der Dunk notes, ‘the absence of a clear international regime dealing with these issues also stifles any private activities with positive and honourable motives’.<sup>78</sup> Changing the narrative to distinguish these activities from the negative history of past colonisation on Earth is an important first step towards large-scale international cooperation, governmental and non-governmental, in the

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<sup>73</sup> *Outer Space Treaty* (n 2) art VIII.

<sup>74</sup> Stephen Hawking, *Brief Answers to the Big Questions* (John Murray, 2018) 179–180.

<sup>75</sup> United Nations General Assembly, *Reports of the Committee on the Peaceful Uses of Outer Space*, UN GAOR, UN Doc A/C.I/SR.986 (17 November 1958).

<sup>76</sup> Quoted in Karl Leib, ‘State Sovereignty in Space: Current Models and Possible Futures’ (2015) 13(1) *Astropolitics* 1, 3.

<sup>77</sup> Sharpe and Tronchetti (n 41) 659.

<sup>78</sup> Frans von der Dunk et al, ‘Surreal Estate: Addressing the Issue of “Immovable Property Rights on the Moon”’ (2004) 20(3) *Space Policy* 149, 150.

development of a legal framework for the establishment and operation of human habitats on Mars, and other celestial bodies, for the future of humanity.

## VI CONCLUSION

Humankind is achieving technological advancements that will soon see its reach extend beyond the Moon. Efforts to reach an agreeable position on the legality of such human endeavours need to continue, in order to avoid the need for reactive determinations once humankind makes the inevitable next giant leap among the stars. It is imperative that a legal framework is developed to govern a human habitat on Mars to ensure compliance with the rule of law, to ensure clarity of rights and obligations between inhabitants, and to provide a legally stable environment conducive to the venture's long term success. Changing the narrative is an important first step towards ensuring that the future of humanity as a whole, rather than the national interest of individual states, is at the forefront of endeavours to establish permanent human habitats in outer space.

## A MISSED OPPORTUNITY: HOW AUSTRALIA FAILED TO MAKE ITS MODERN SLAVERY ACT A GLOBAL EXAMPLE OF GOOD PRACTICE

### I INTRODUCTION

The internationalisation of supply chains is an inevitable part of modern production. Despite being the subject of extensive debate globally, including at the UN-level, accountability for exploitation in those supply chains remains a challenge.<sup>1</sup> Over the last few years, several countries have enacted legislation to regulate and hopefully eradicate associated exploitation, often referring to ‘modern slavery’. There is some degree of agreement that ‘modern slavery’ encompasses forms of forced labour, debt bondage and forced marriage,<sup>2</sup> but it is frequently — and often loosely — used to encompass broader forms of exploitation.

Among the legislative responses to ‘modern slavery’, the Act that probably received the most coverage was the (poorly named) *Modern Slavery Act 2015* (UK).<sup>3</sup> The law created an obligation on corporations with a turnover of more than

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\* Chancellor’s Post-Doctoral Research Fellow, Faculty of Law at the University of Technology Sydney; author of *Sex, Slavery and the Trafficked Woman: Myths and Misconceptions About Trafficking and its Victims* (Routledge, 2015).

<sup>1</sup> Richard Locke, Matthew Amengual and Akshay Mangla, ‘Virtue out of Necessity? Compliance, Commitment, and the Improvement of Labor Conditions in Global Supply Chains’ (2009) 37(3) *Politics & Society* 319; Richard Welford and Stephen Frost, ‘Corporate Social Responsibility in Asian Supply Chains’ (2006) 13(3) *Corporate Social Responsibility and Environmental Management* 166.

<sup>2</sup> International Labour Organisation and Walk Free Foundation, *Global Estimates of Modern Slavery: Forced Labour and Forced Marriage* (Report, 2017) <[https://www.ilo.org/wcmsp5/groups/public/@dgreports/@dcomm/documents/publication/wcms\\_575479.pdf](https://www.ilo.org/wcmsp5/groups/public/@dgreports/@dcomm/documents/publication/wcms_575479.pdf)>.

<sup>3</sup> The problems with the language of ‘modern slavery’ have been widely acknowledged in academic and policy circles: see Professor Surya Deva, ‘Modern Slavery: Are the Current Regulatory Responses Modern and Gender Sensitive?’ (Conference Paper, Applying the Gender Lens to the UN Guiding Principles on Business and Human Rights: Australian Consultation, 14 November 2019); Ramona Vijayarasa and Jose Miguel Bello y Villarino, ‘Modern-Day Slavery — A Judicial Catchall for Trafficking, Slavery and Labour Exploitation: A Critique of Tang and Rantsev’ (2013) 9(1) *Journal of International Law and International Relations* 38; Jean Allain, ‘Contemporary Slavery and Its Definition in Law’ in Annie Bunting and Joel Quirk (eds), *Contemporary Slavery: Popular Rhetoric and Political Practice* (UBC Press, 2017).

GBP36 million — around 13,000 corporations<sup>4</sup> — to report on the steps they have taken to identify instances of slavery and trafficking in their supply chain or in any part of their businesses, or to disclose a failure to undertake such due diligence.<sup>5</sup> Meanwhile, in 2016, the Netherlands introduced the *child labour due diligence law* which will take effect on 1 January 2020,<sup>6</sup> while the French adopted their ‘Duty of Vigilance Law’ in February 2017.<sup>7</sup> The French law has a wider scope but establishes concrete obligations to prevent exploitation within the supply chains of large multinational firms carrying out a significant part of their activity in France.<sup>8</sup> The European Union is governed by both the EU Non-Financial Reporting Directive,<sup>9</sup> which requires the management of around 8,000 large European companies to disclose their policies, risks and responses related to respect for human rights, as well as an EU Regulation laying down supply chain due diligence obligations in mining.<sup>10</sup>

At the end of last year, Australia introduced the *Modern Slavery Act 2018* (Cth), establishing reporting obligations for businesses with an annual turnover of \$100 million, affecting around 2,500 companies.<sup>11</sup> Businesses are required to report on the due diligence they have conducted with respect to potential risks of exploitation in their supply chains, including how they have assessed such risks and

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<sup>4</sup> Human Rights Law Centre, Submission No 27 to Joint Standing Committee on Foreign Affairs, Defence and Trade, Parliament of Australia, *Inquiry into Establishing a Modern Slavery Act in Australia* (April 2017) 9.

<sup>5</sup> *Modern Slavery Act 2015* (UK) s 54.

<sup>6</sup> *Initiatieforstel Wet zorgplicht kinderarbeid* [Child Labour Due Diligence Law] (Netherlands) 24 June 2016 [tr author].

<sup>7</sup> *Loi n° 2017-399 du 27 mars 2017* [Law No 2017-399 of 27 March 2017] (France) JO, 28 March 2017, text n° 1 of 99 (‘Law No 2017-399’).

<sup>8</sup> Stéphanie Poirot, ‘Devoir de Vigilance des Entreprises : Entre Hard et Soft Law, une Réponse au « Social Washing » ?’, *The Conversation* (online, 24 May 2018) <<http://theconversation.com/devoir-de-vigilance-des-entreprises-entre-hard-et-soft-law-une-reponse-au-social-washing-96451>>. The law came into effect in March 2017, but with the proposed civil penalties for violating corporations struck down following a decision of the Constitutional Council: see Conseil constitutionnel [French Constitutional Court], decision n° 2017-750 DC, 23 March 2017, reported in JO, 28 March 2017, text n° 2 of 99.

<sup>9</sup> *Directive 2014/95/EU of the European Parliament and of the Council of 22 October 2014 Amending Directive 2013/34/EU as Regards Disclosure of Non-financial and Diversity Information by Certain Large Undertakings and Groups* [2014] OJ L 330/1.

<sup>10</sup> *Regulation (EU) 2017/821 of the European Parliament and of the Council of 17 May 2017 Laying Down Supply Chain Due Diligence Obligations for Union Importers of Tin, Tantalum and Tungsten, Their Ores, and Gold Originating from Conflict-affected and High-risk areas* [2017] OJ L 130/1.

<sup>11</sup> Advisory Committee of the Modern Slavery Registry, Submission No 9 to Joint Standing Committee on Foreign Affairs, Defence and Trade, Parliament of Australia, *Inquiry into Establishing a Modern Slavery Act in Australia* (2017) 2.

established ‘remediation processes’ as well as the effectiveness of their response.<sup>12</sup> This Commonwealth legislation followed the enactment a few months earlier of the *Modern Slavery Act 2018* (NSW), which contains a lower threshold requirement of \$50 million annual turnover and establishes oversight by the Anti-Slavery Commissioner of New South Wales.<sup>13</sup> Following this global trend, the New Zealand Human Rights Commission is raising awareness about the implications of new global regulations for New Zealand companies,<sup>14</sup> while Canada has considered enacting its own law.<sup>15</sup>

This article focuses on the Commonwealth law as one of the most recent but under-examined examples of regulation in this area. It particularly looks at the gap between the opinions expressed in submissions to the Parliament of Australia (‘Parliament’) during the drafting process and the final Commonwealth law. It shows a surprising disregard for the majority of submissions made to the Australian Joint Standing Committee on Foreign Affairs, Defence and Trade (‘Joint Standing Committee’). In this article, I argue that if the process had incorporated some of the most progressive of these recommendations, it could have delivered an all-encompassing response to supply chain exploitation, recognising the interlinkages between gendered rights violations, environmental concerns and human rights due diligence with a fundamental focus on worker’s rights. Hence, I describe the outcome — the *Modern Slavery Act 2018* (Cth) — as a missed opportunity.

In the next sections, I identify several concrete recommendations that were not incorporated into Australia’s *Modern Slavery Act 2018* (Cth). Yet, as a preliminary and overarching point, the inadequate comparative approach of drafters must be singled out. Despite the breadth of examples to draw from, the Parliament’s starting point was almost exclusively the United Kingdom’s law.<sup>16</sup> It ignored other earlier regulatory developments, particularly those cited above as well as even earlier ones from the

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<sup>12</sup> *Modern Slavery Act 2018* (Cth).

<sup>13</sup> *Modern Slavery Act 2018* (NSW).

<sup>14</sup> Rebekah Armstrong, ‘What the Australian Modern Slavery Act Will Mean for Big Kiwi Businesses’, *NZ Herald* (online, 12 December 2018) <[https://www.nzherald.co.nz/business/news/article.cfm?c\\_id=3&objectid=12175694&fbclid=IwAR3TJCV1h6itfmBtJnj1KCTqQCnKFR839l-mnwVRakC71tiohMpuXk5Dps](https://www.nzherald.co.nz/business/news/article.cfm?c_id=3&objectid=12175694&fbclid=IwAR3TJCV1h6itfmBtJnj1KCTqQCnKFR839l-mnwVRakC71tiohMpuXk5Dps)>.

<sup>15</sup> Standing Committee on Foreign Affairs and International Development, Parliament of Canada, *A Call to Action: Ending the Use of All Forms of Child Labour in Supply Chains* (Report No 19, 15 October 2018) <<https://www.ourcommons.ca/DocumentViewer/en/42-1/FAAE/report-19>>.

<sup>16</sup> The Terms of Reference of the Joint Standing Committee (2017) made explicit reference to the *Modern Slavery Act 2015* (UK) as the starting point for the Australian legislation as well as the Joint Standing Committee’s earlier report, *Trading Lives: Modern Day Human Trafficking* (Report, June 2013) <[https://www.aph.gov.au/parliamentary\\_business/committees/house\\_of\\_representatives\\_committees?url=jfadt/slavery\\_people\\_trafficking/report.htm](https://www.aph.gov.au/parliamentary_business/committees/house_of_representatives_committees?url=jfadt/slavery_people_trafficking/report.htm)>: see ‘Terms of Reference’, *Parliament of Australia* (Web Page) <[https://www.aph.gov.au/Parliamentary\\_Business/Committees/Joint/Foreign\\_Affairs\\_Defence\\_and\\_Trade/ModernSlavery/Terms\\_of\\_Reference](https://www.aph.gov.au/Parliamentary_Business/Committees/Joint/Foreign_Affairs_Defence_and_Trade/ModernSlavery/Terms_of_Reference)>.

United States. For instance, in addition to the *California Transparency in Supply Chains Act of 2010*,<sup>17</sup> under President Obama, the United States introduced the ‘Dodd-Frank Act’ which included provisions related to conflict minerals from the Democratic Republic of Congo,<sup>18</sup> an Executive Order strengthening the prohibition on United States federal contractors from engaging in human trafficking activities,<sup>19</sup> and an Executive Order for reporting requirements on companies investing in Myanmar.<sup>20</sup> Although several submissions to the Joint Standing Committee described these other global examples in depth,<sup>21</sup> the drafters adopted the detrimental decision to ignore the lessons learnt from these earlier experiences and, hence, limited *ex ante*, the potential of the law, to be a progressive, all-encompassing global example.

## II AUSTRALIA’S MODERN SLAVERY ACT: A MISSED OPPORTUNITY BY PARLIAMENT

An essential starting point to enacting legislation in this area is for a country to understand how its corporate, labour and trade practices — both as companies and consumers — sustain exploitation in global or regional supply chains. Yet Australia evidently lacked this knowledge at the outset of the drafting process.<sup>22</sup>

The call for submissions by the Joint Standing Committee, alongside several other consultative processes,<sup>23</sup> was partially aimed at addressing this gap. The now dissolved Joint Standing Committee was tasked in February 2017 by Attorney-General George Brandis with inquiring into and reporting on ‘Establishing a

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<sup>17</sup> Cal Civil Code § 1714.43; Cal Revenue and Taxation Code § 19547.5.

<sup>18</sup> *Dodd-Frank Wall Street Reform and Consumer Protection Act 2010*, Pub L No 111–203, 124 Stat 1376–2223.

<sup>19</sup> *Strengthening Protections Against Trafficking in Persons in Federal Contracts*, 77 Fed Reg 60029 (2 October 2012).

<sup>20</sup> *Blocking Property of Persons Threatening the Peace, Security or Stability of Burma*, 77 Fed Reg 41243 (13 July 2012).

<sup>21</sup> Baker and McKenzie and Lambrook Hampton, Submission No 22 to Joint Standing Committee on Foreign Affairs, Defence and Trade, Parliament of Australia, *Inquiry into Establishing a Modern Slavery Act in Australia* (28 April 2017); Australian Institute of Employment Rights, Submission No 45 to Joint Standing Committee on Foreign Affairs, Defence and Trade, Parliament of Australia, *Inquiry into Establishing a Modern Slavery Act in Australia* (28 April 2017); Australian Council of Trade Unions, Submission No 113 to Joint Standing Committee on Foreign Affairs, Defence and Trade, Parliament of Australia, *Inquiry into Establishing a Modern Slavery Act in Australia* (4 May 2017); Human Rights Law Centre (n 4).

<sup>22</sup> Echo Project, Submission No 189 to Joint Standing Committee on Foreign Affairs, Defence and Trade, Parliament of Australia, *Inquiry into Establishing a Modern Slavery Act in Australia* (22 June 2017).

<sup>23</sup> Joint Standing Committee on Foreign Affairs, Defence and Trade, ‘Public Hearings’ (Web Page, 2017) <[https://www.aph.gov.au/Parliamentary\\_Business/Committees/Joint/Foreign\\_Affairs\\_Defence\\_and\\_Trade/ModernSlavery/Public\\_Hearings](https://www.aph.gov.au/Parliamentary_Business/Committees/Joint/Foreign_Affairs_Defence_and_Trade/ModernSlavery/Public_Hearings)>.

Modern Slavery Act in Australia'.<sup>24</sup> Over a period of around six months, 10 public hearings were held and 225 submissions<sup>25</sup> were received from government agencies, businesses and their representative bodies, non-governmental organisations (faith-based, human-rights based and development-sector NGOs) as well as the academy and interested non-expert individuals.<sup>26</sup> Yet, this participatory approach was marred by the very limited incorporation of some of the most pertinent and progressive of the recommendations addressing gender, labour rights, trade and the environment made in several submissions.

A second and related starting point is the legal framework within which such laws would operate. Although a law requiring businesses to enhance their due diligence regarding exploitation within their supply chains was indeed missing, the Australian legal context prior to enactment of the Commonwealth law differed significantly from what existed in the United Kingdom before the enactment of its *Modern Slavery Act 2015* (UK). Australia already had a relatively robust set of laws in existence addressing trafficking, slavery-like practices such as servitude, forced labour, deceptive recruitment for labour or services, exploitation within intimate relationships and forced marriage, as well as laws related to vulnerable witness protection, confiscation of passports and proceeds of crime.<sup>27</sup> Yet, again, Parliament largely ignored submissions that laid out the differences between the legislative context of the United Kingdom and Australia, including a substantive submission by the Attorney-General's Department on this point.<sup>28</sup>

Had these differences been better acknowledged at the outset, the Joint Standing Committee could have narrowed its terms of reference and submissions could have engaged more deeply on the specific issue of supply chain regulation. In turn, the final law may not have defined 'modern slavery' to include a series of already

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<sup>24</sup> This particular Joint Committee was dissolved by the House of Representatives on 11 April 2019.

<sup>25</sup> Joint Standing Committee on Foreign Affairs, Defence and Trade, 'Submissions' (Web Page, 2017) <[https://www.aph.gov.au/Parliamentary\\_Business/Committees/Joint/Foreign\\_Affairs\\_Defence\\_and\\_Trade/ModernSlavery/Submissions](https://www.aph.gov.au/Parliamentary_Business/Committees/Joint/Foreign_Affairs_Defence_and_Trade/ModernSlavery/Submissions)>.

<sup>26</sup> For more details on the breakdown of submissions by organisation-type, see Ramona Vijayarasa, 'Women, Work and Global Supply Chains: The Gender-Blind Nature of Australia's Modern Slavery Regulatory Regime' (2020) 26(1) *Australian Journal for Human Rights* (forthcoming).

<sup>27</sup> *Criminal Code (Slavery and Slavery-like Offences) Act 1995* (Cth); *Criminal Code Amendment (Slavery and Sexual Servitude) Act 1999* (Cth); *Criminal Code Amendment (Trafficking in Persons Offences) Act 2005* (Cth); *Foreign Passports (Law Enforcement and Security) Act 2005* (Cth); *Crimes Legislation Amendment (Law Enforcement Integrity, Vulnerable Witness Protection and Other Measures) Act 2013* (Cth); *Proceeds of Crime Act 2002* (Cth); *Fair Work Act 2009* (Cth); *Fair Work Amendment (Protecting Vulnerable Workers) Act 2017* (Cth).

<sup>28</sup> Attorney-General's Department (Criminal Justice Policy and Programmes Division), Submission No 89 to Joint Standing Committee on Foreign Affairs, Defence and Trade, Parliament of Australia, *Inquiry into Establishing a Modern Slavery Act in Australia* (April 2017).

regulated crimes (such as sexual servitude) that often have little to do with supply chain exploitation by medium and large-sized corporations.<sup>29</sup> This is a problem in the *Modern Slavery Act 2018* (NSW) too. Its Schedule of Offences, for example, lists crimes that are largely unrelated to supply chain exploitation by medium and large-scale corporations (such as the production of child abuse materials).<sup>30</sup>

A further pertinent issue for the parliamentary debates was whether a turnover threshold should apply and if so, what amount. The final threshold in the *Modern Slavery Act 2015* (UK) was lower than what was debated.<sup>31</sup> While ideally from a human rights perspective all businesses would be obliged to report, with one submission calling for no minimum threshold at all,<sup>32</sup> from an economic perspective, this could place an unreasonable burden on small to medium-sized businesses.

The *Modern Slavery Act 2018* (Cth) set out a threshold of AUD100 million in annual turnover (roughly USD70 million). Yet, in Australia, a small business is defined by the Australian Tax Office as having an annual turnover of less than AUD10 million. A wide range of medium-to-big-sized businesses fall outside the scope of the law. Alternatively, Parliament could have considered a risk-based approach for companies within a lower turnover bracket, forcing them to assess their exposure to exploitative supply chains, and therefore potentially widening the reach of the law where relevant.

Parliament followed some of the more obvious recommendations related to reporting requirements, including for single entities<sup>33</sup> and for joint reports, such as by a parent company and its subsidiaries.<sup>34</sup> The *Modern Slavery Act 2018* (Cth) also places reporting obligations on public authorities who need to demonstrate the due diligence undertaken in the procurement of goods, services and construction, an improvement on the United Kingdom's model recommended in a number of submissions.<sup>35</sup> It also establishes a central repository for the modern slavery statements prepared by companies.<sup>36</sup> Following suggestions in several submissions,<sup>37</sup> the *Modern Slavery*

<sup>29</sup> *Modern Slavery Act 2018* (Cth) s 4.

<sup>30</sup> *Modern Slavery Act 2018* (NSW) sch 2.

<sup>31</sup> Advisory Committee of the Modern Slavery Registry (n 11).

<sup>32</sup> See Fairtrade Australia & New Zealand, Submission No 49 to Joint Standing Committee on Foreign Affairs, Defence and Trade, Parliament of Australia, *Inquiry into Establishing a Modern Slavery Act in Australia* (April 2017).

<sup>33</sup> *Modern Slavery Act 2018* (Cth) s 13.

<sup>34</sup> *Ibid* ss 14–16.

<sup>35</sup> *Ibid* s 5(1)(b)–(c); British Institute of International and Comparative Law, Submission No 108 to Joint Standing Committee on Foreign Affairs, Defence and Trade, Parliament of Australia, *Inquiry into Establishing a Modern Slavery Act in Australia* (2017).

<sup>36</sup> *Modern Slavery Act 2018* (Cth) ss 18–20.

<sup>37</sup> Advisory Committee of the Modern Slavery Registry (n 11); Anti-Slavery International, Submission No 186 to Joint Standing Committee on Foreign Affairs, Defence and Trade, Parliament of Australia, *Inquiry into Establishing a Modern Slavery Act in Australia* (June 2017); Australian Council of Trade Unions (n 21); Australian Institute of Employment Rights (n 21).

*Act 2018* (Cth) also establishes extra-territorial reach.<sup>38</sup> Australian companies operating abroad must disclose the risks in their supply chains domestically and overseas.

However, contrary to clear demands from civil society<sup>39</sup> and even business,<sup>40</sup> there are very limited consequences if corporations fail to report properly. The architecture of the law has shifted the burden of determining if a human rights violation has taken place from government to businesses. For this to work, it must be accompanied by strong incentives to ensure such due diligence is adequate and that businesses respond to the outcomes of investigations. Yet, the Australian sanctions are weak at best, arguably also one of the weakest elements of the United Kingdom's law too.<sup>41</sup>

Two types of sanctions are relevant in this context. The first relates to the basic issue of reporting. Submissions recommended robust monitoring and enforcement mechanisms, with sanctions imposed for: failure to produce a modern slavery statement; failure to meet minimum reporting requirements, including mandatory information; and failure to outline steps to address modern slavery risks.<sup>42</sup> The second issue is sanctions in response to identified cases of exploitation. Given that victims of corporate abuses often struggle to access justice,<sup>43</sup> a victim compensation scheme is an obvious solution that was also recommended but ignored.<sup>44</sup> Moreover, contrary to extensive recommendations by both civil society and business,<sup>45</sup> the

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<sup>38</sup> *Modern Slavery Act 2018* (Cth) ss 9–10.

<sup>39</sup> Australian Institute of Employment Rights (n 21); Amnesty International Australia, Submission No 154 to Joint Standing Committee on Foreign Affairs, Defence and Trade, Parliament of Australia *Inquiry into Establishing a Modern Slavery Act in Australia* (19 May 2017); Advisory Committee of the Modern Slavery Registry (n 11); Anti-Slavery Australia, Submission No 156 to Joint Standing Committee on Foreign Affairs, Defence and Trade, Parliament of Australia, *Inquiry into Establishing a Modern Slavery Act in Australia* (2017).

<sup>40</sup> Australian Council of Superannuation Investors, Submission No 107 to Joint Standing Committee on Foreign Affairs, Defence and Trade, Parliament of Australia, *Inquiry into Establishing a Modern Slavery Act in Australia* (2 May 2017).

<sup>41</sup> Genevieve LeBaron and Andreas Rühmkorf, 'The Domestic Politics of Corporate Accountability Legislation: Struggles over the 2015 UK Modern Slavery Act' [2017] *Socio-Economic Review* 1, 26–27; Frank Field, Maria Miller and Baroness Elizabeth Butler-Sloss, *Second Interim Report: Transparency in Supply Chains — Independent Review of the Modern Slavery Act 2015* (Report, 22 January 2019) 13.

<sup>42</sup> Advisory Committee of the Modern Slavery Registry (n 11).

<sup>43</sup> *Ibid.*

<sup>44</sup> Focus on Labour Exploitation (FLEX), Submission No 163 to Joint Standing Committee on Foreign Affairs, Defence and Trade, Parliament of Australia, *Inquiry into Establishing a Modern Slavery Act in Australia* (18 May 2017).

<sup>45</sup> ANZ Banking Group, Submission No 30 to Joint Standing Committee on Foreign Affairs, Defence and Trade, Parliament of Australia, *Inquiry into Establishing a Modern Slavery Act in Australia* (27 April 2017); Australian Council of Superannuation Investors (n 40); Australian Council of Trade Unions (n 21); Australian Lawyers

government is not required to publish a list of entities required to report, significantly undermining the work of civil society in holding businesses to account for such rights violations.

The above concerns are bare minimums for a piece of legislation on due diligence reporting that are missing in the law. However, several other submissions contained recommendations that could have resulted in a global good practice model. A significant and surprising number of submissions — from civil society through to business and their representative bodies — recommended some type of oversight mechanism, whether this be in the form of an Anti-Slavery Commissioner<sup>46</sup> or a modern slavery ombudsman, with specific references to the goal of better protecting the rights of those who may otherwise be exploited. The International Women’s Development Agency took this one step further, arguing for such an oversight role to focus on women and children as well as exploitation or discrimination on the basis of one’s sexual orientation or gender identity.<sup>47</sup> No such federal oversight mechanism was established and instead, responsibility for overseeing implementation and monitoring under the *Modern Slavery Act 2018* (Cth) presently sits with the Minister for Home Affairs.

One submission identified the importance of raising awareness among Australian backpackers working in the horticulture industry about the high incidence of sexual harassment in this space,<sup>48</sup> a submission that is well supported by the recently enacted International Labour Organisation’s *Convention Concerning the Elimination of Violence and Harassment in the World of Work*.<sup>49</sup> Recommendations also spoke to the relevance of trade to this debate and the potential for the law to exclude from Australian markets goods tainted with child labour and forced labour.<sup>50</sup> Such recommendations identified the ingredients for a human-rights based, gender-responsive

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for Human Rights, Submission No 67 to Joint Standing Committee on Foreign Affairs, Defence and Trade, Parliament of Australia, *Inquiry into Establishing a Modern Slavery Act in Australia* (27 April 2017).

<sup>46</sup> See eg Amnesty International Australia, Submission No 154 to Joint Standing Committee on Foreign Affairs, Defence and Trade, Parliament of Australia, *Inquiry into Establishing a Modern Slavery Act in Australia* (19 May 2017); Fairtrade Australia & New Zealand (n 32); Anti-Slavery Australia (n 39).

<sup>47</sup> International Women’s Development Agency, Submission No 34 to Joint Standing Committee on Foreign Affairs, Defence and Trade, Parliament of Australia, *Inquiry into Establishing a Modern Slavery Act in Australia* (27 April 2017).

<sup>48</sup> Tom and Mia’s Legacy Foundation, Submission No 182 to Joint Standing Committee on Foreign Affairs, Defence and Trade, Parliament of Australia, *Inquiry into Establishing a Modern Slavery Act in Australia* (23 May 2017).

<sup>49</sup> International Labour Organisation, ‘New International Labour Standard to Combat Violence, Harassment, at Work Agreed’ (Media Release, 21 June 2019) <[https://www.ilo.org/ilc/ILCSessions/108/media-centre/news/WCMS\\_711321/lang--en/index.htm](https://www.ilo.org/ilc/ILCSessions/108/media-centre/news/WCMS_711321/lang--en/index.htm)>; *Convention Concerning the Elimination of Violence and Harassment in the World of Work*, opened for ratification 21 June 2019 <[https://www.ilo.org/dyn/normlex/en/f?p=NORMLEXPUB:12100:0::NO:12100:P12100\\_INSTRUMENT\\_ID:3999810:NO](https://www.ilo.org/dyn/normlex/en/f?p=NORMLEXPUB:12100:0::NO:12100:P12100_INSTRUMENT_ID:3999810:NO)>.

<sup>50</sup> Human Rights Law Centre (n 4); Anti-Slavery International (n 37).

and worker-centred law. The failure to take them on board was a loss both for Australia's global standing, and more importantly, for those victims affected by supply chain exploitation.

### III LESSONS FOR OTHER JURISDICTIONS

Several lessons come to mind for jurisdictions considering the enactment of regulations to address supply chain exploitation. First, any law introduced must respond to the pre-existing regulatory environment and the nature in which domestic companies engage in contemporary forms of labour exploitation at home or abroad. Supply-chain legislation must be adapted to local needs rather than simply transposing regulatory measures from abroad.

Second, beyond raising the consciousness of consumers and businesses regarding their roles in sustaining exploitation, regulations require accountability, transparency and sanctions if the global regulatory momentum gathered to date is to be utilised to reduce — ideally to eradicate — global supply chain exploitation. France, the Netherlands, the United States, and the European Union's conflict minerals regulations specify that organisations must not only conduct due diligence of their supply chains, but must also act.

Third, laws should explicitly call for the adoption of gender-sensitive due diligence processes and the collection of gender-disaggregated data.<sup>51</sup> A good practice law would address environmental damage alongside human rights violations, as the French law does.<sup>52</sup>

Fourth, trade regulations should be considered. Ideally, regulations would prohibit the import of any goods that were produced or manufactured, in whole or in part, using forced labour, slave labour, child labour or the labour of persons who have been trafficked.

Finally, public procurement is an essential part of this issue, including in the defence sector. Drawing from the words of Barack Obama, 'as the largest single purchaser of goods and services in the world, the United States Government bears a responsibility to ensure that taxpayer dollars do not contribute to trafficking in persons'.<sup>53</sup>

Government contracts must be the subject of due diligence as well.

It is a positive development that countries like Canada are considering to follow the global trend. Learning from the United Kingdom and Australia's mistakes, there is scope for other countries to make better use of the opportunity. Some businesses,

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<sup>51</sup> Vijayarasa (n 26); Surya Deva, 'Slavery and Gender-Blind Regulatory Responses', *Cambridge Core Blog* (Blog Post, 8 March 2019) <<http://blog.journals.cambridge.org/2019/03/08/slavery-and-gender-blind-regulatory-responses/>>.

<sup>52</sup> Law No 2017-399 (n 7) art 1.

<sup>53</sup> *Strengthening Protections Against Trafficking in Persons in Federal Contracts*, 77 Fed Reg 60029 (2 October 2012).

government entities and even civil society may argue that a gender-responsive, environmentally conscious effort to eradicate labour exploitation in global supply chains is overly robust and unrealistic. Yet, even if we return to the bare minimum requirements, accountability is key. Parliament decided to ignore the submissions advocating for stronger accountability mechanisms and missed the opportunity to become a global good practice model.

*Mitchell Brunker\**

**PROTECTION OF CHILDREN: DIVERGENT  
APPROACHES TO THE MAKING OF  
A SUPPRESSION ORDER:  
*AB V CD* (2019) 364 ALR 202**

‘There can be no keener revelation of a society’s soul than the way in which it treats its children.’<sup>1</sup>

*Nelson Mandela*

I A PRIMARY CONSIDERATION

In discussing the legal obligation to consider the best interests of a child, one might point to the well-traversed principles governing the courts’ *parens patriae* jurisdiction,<sup>2</sup> the objects of the *Family Law Act 1975* (Cth),<sup>3</sup> or, indeed, Australia’s obligations under international law.<sup>4</sup> Instead, it is likely that quite apart from the multitude of legal obligations

any reasonable person ... would, in my view, assume that the best interests of the child would be a primary consideration in all administrative decisions which directly affect children as individuals and which have consequences for their future welfare.<sup>5</sup>

Justice Gaudron’s aphorism could well be applied to any intervention of the State that involves children. We all hold a basic assumption that our society will protect its children, and all vulnerable members of society, as a paramount consideration.

That then, perhaps strangely, leads us to the series of applications for non-publication orders over the name and image of the former barrister and police informant popularly

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\* BCom (Adel), Hons LLB Candidate; Associate Editor, *Adelaide Law Review*, The University of Adelaide.

<sup>1</sup> Address by President Nelson Mandela at the launch of the Nelson Mandela Children’s Fund, Pretoria, 8 May 1995 <[http://www.mandela.gov.za/mandela\\_speeches/1995/950508\\_nmcf.htm](http://www.mandela.gov.za/mandela_speeches/1995/950508_nmcf.htm)>.

<sup>2</sup> See, eg, *J v C* [1970] AC 668, 699–700 (Lord Guest).

<sup>3</sup> *Family Law Act 1975* (Cth) s 60B.

<sup>4</sup> *Convention on the Rights of the Child*, opened for signature 20 November 1989, 1577 UNTS 3 (entered into force 2 September 1990) art 3(1).

<sup>5</sup> *Minister for Immigration and Ethnic Affairs v Teoh* (1995) 183 CLR 273, 304 (Gaudron J).

known as Lawyer X (*AB Decisions*). A critical feature of the *AB Decisions* was the balancing act undertaken by the High Court of Australia and the Courts below to weigh up, on the one hand, EF's<sup>6</sup> safety as an informant and, on the other, the integrity of the criminal justice system.<sup>7</sup> Important too are the deeply concerning ethical ramifications that have arisen out of EF's conduct.<sup>8</sup> Yet, this case note will consider neither of these issues. Rather, I am far more concerned with EF's separate and distinct applications to the Victorian Supreme Court of Appeal ('Court of Appeal') and the High Court to suppress the names and images of her two children.

Whatever one's opinion of EF or her conduct, the treatment of her children should have been a matter of little controversy. If, as was accepted, the children were at risk without a non-publication order, and if, as could scarcely be argued, there was no legitimate public interest in their identities being known,<sup>9</sup> doubtless then most people would have expected the children's identities to be suppressed. However, on this very point, the two courts arrived at irreconcilably divergent conclusions. Remarkably, on 21 February 2019, the Court of Appeal dismissed EF's application for a non-publication order in respect of her children.<sup>10</sup> Only six days later in the High Court, considering the same law and largely the same evidence, Nettle J (sitting as a single Justice) granted a 15-year non-publication order over the children's identities.<sup>11</sup> This case note will examine how the Courts came to such markedly different results.

## II FUNDAMENTAL AND APPALLING

### A *AB, CD, EF and IBAC*

To understand why EF was seeking the orders she was, it is necessary to delve into some of the broader background. The genesis of the proceedings was in February 2015, when the Victorian Independent Broad-Based Anti-Corruption Commission

<sup>6</sup> I will refer to her by the pseudonym given to her by the various courts: *AB v CD* [2017] VSC 350, [1] (Ginnane J); *AB v CD* [2017] VSCA 338, [1] n 1 (Ferguson CJ, Osborn and McLeish JJA); *AB (a pseudonym) v CD (a pseudonym)* (2018) 362 ALR 1, 3 [1] (Kiefel CJ, Bell, Gageler, Keane, Nettle, Gordon and Edelman JJ).

<sup>7</sup> See *AB (a pseudonym) v CD (a pseudonym)* (2018) 362 ALR 1; *AB v CD* [2017] VSCA 338; *AB v CD* [2017] VSC 350.

<sup>8</sup> See Arthur Moses SC, 'Opinion Piece: Breach of Duties from Lawyer X, Police an Attack on Democracy and Justice', *Law Council of Australia* (Opinion, 22 February 2019) <<https://www.lawcouncil.asn.au/media/news/opinion-piece-breach-of-duties-from-lawyer-x-police-an-attack-on-democracy-and-justice>>.

<sup>9</sup> None of the parties sought to challenge either of these points — with the curious exception of The Age and the media parties, an exception to which I will later return: *AB (a pseudonym) v CD (a pseudonym)* (2019) 364 ALR 202, 207 [20] (Nettle J); *AB v CD* [2019] VSCA 28, [86] (Ferguson CJ, Beach and McLeish JJA).

<sup>10</sup> *AB v CD* [2019] VSCA 28, [89]–[90].

<sup>11</sup> *AB (a pseudonym) v CD (a pseudonym)* (2019) 364 ALR 202, 207 [21] (Nettle J).

(‘IBAC’) provided the Victorian Commissioner of Police with a report critical of EF’s role as a police informant.<sup>12</sup> The Police Commissioner (referred to as AB in proceedings) provided the IBAC Report to the Victorian Director of Public Prosecutions (referred to as CD in proceedings). With the content of the IBAC Report being what it was, the Victorian Director of Public Prosecutions (‘DPP’) considered that he was under a duty to disclose information from the report to persons who had been convicted as a result of information sourced from EF.<sup>13</sup>

Of course, the right of convicted persons to know the relevant information must be balanced against EF’s right, as a police informant, to be kept safe. In the circumstances, the Police Commissioner considered that EF and her children would be at a real risk of harm if the information in the IBAC Report were disclosed. As such, the Police Commissioner instituted proceedings in the Supreme Court of Victoria asserting that the information was subject to public interest immunity. EF was joined to those proceedings, but also launched separate proceedings of her own arguing that disclosure would constitute an equitable breach of confidence.<sup>14</sup>

Justice Ginnane, hearing both proceedings concurrently, dismissed the claims of both the Police Commissioner and EF.<sup>15</sup> On appeal, the unanimous Court of Appeal dismissed the appeals from both the public interest immunity and breach of confidence proceedings.<sup>16</sup> Subsequently, in a highly publicised decision, the High Court revoked its earlier grant of special leave — taking the opportunity to decry the ‘fundamental and appalling breaches’ by EF of her ethical obligations and duties to the court.<sup>17</sup>

### B *(Un)necessary*

After the High Court’s highly publicised revocation of special leave,<sup>18</sup> the DPP was free to disclose the details of EF’s conduct to her former, now convicted, clients. Importantly, the resulting public outrage over EF and Victoria Police’s conduct had culminated in Victorian Premier Daniel Andrews announcing the Royal Commission into the Management of Police Informants (‘Royal Commission’).<sup>19</sup>

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<sup>12</sup> *AB (a pseudonym) v CD (a pseudonym)* (2018) 362 ALR 1, 3 [1].

<sup>13</sup> *Ibid.*

<sup>14</sup> *Ibid* 3 [2].

<sup>15</sup> See *AB v CD* [2017] VSC 350, [422]; *EF v CD* [2017] VSC 351, [38].

<sup>16</sup> *AB v CD* [2017] VSCA 338, [214], [231].

<sup>17</sup> *AB (a pseudonym) v CD (a pseudonym)* (2018) 362 ALR 1, 4 [10], 5 [13].

<sup>18</sup> *AB (a pseudonym) v CD (a pseudonym)* (2018) 362 ALR 1, 5 [13].

<sup>19</sup> Royal Commission into the Management of Police Informants, ‘About the Commission’, *Royal Commissioner into the Management of Police Informants* (Web Page, 12 July 2019) <<https://www.rcmpi.vic.gov.au/the-commission>>; ‘Victorian Government Calls Royal Commission into Potentially Tainted Gangland Convictions’, *ABC News* (online, 3 December 2018) <<https://www.abc.net.au/news/2018-12-03/victorian-government-royal-commission-gangland-convictions/10577198>>.

Of course, for the Royal Commission to function effectively it could not confine itself to the EF and Lawyer X monikers. It needed to disclose EF's real name and image and, in turn, allow those persons responding to notices to make similar disclosures. Recognising the reality of the Royal Commission's mandate, the High Court varied its earlier orders to allow those disclosures to be made.<sup>20</sup> In response, the Police Commissioner and EF filed separate applications in the Court of Appeal seeking permanent non-publication orders in relation to EF's real name and image.<sup>21</sup> EF additionally sought, *inter alia*, permanent non-publication orders in respect of the real names and images of her children.<sup>22</sup> It should be acknowledged that, at least as far as EF herself was concerned, these applications would have been of limited utility. Not only did EF's former clients already know her identity, but a quick glance at the law reports would have revealed her name recorded as counsel.

The Court of Appeal's power to make suppression orders of the kind sought by the Police Commissioner and EF is found in s 17 of the *Open Courts Act 2013* (Vic). In keeping with principles of open justice, the Act requires a presumption in favour of the disclosure of information.<sup>23</sup> Even with that presumption in mind, the court's discretion is still not at large — the court must further be satisfied that the order is *necessary* to achieve one of a defined number of purposes.<sup>24</sup> For the Police Commissioner and EF, two of those purposes were relevant, namely that

(a) the order is necessary to prevent a real and substantial risk of prejudice to the proper administration of justice that cannot be prevented by other reasonably available means;

...

(c) the order is necessary to protect the safety of any person ...<sup>25</sup>

At least for the application concerning the children, we can see that the latter is the relevant ground.

In examining the Court of Appeal's reasons for ultimately dismissing the applications, there are three points to be made — the positions that the parties and the intervenors took; the meaning their Honours ascribed to 'necessary'; and their Honours' assessment of the risk to the children's safety.

Plainly, on the application to suppress EF's name, the battle lines were clearly drawn. On one side, the Police Commissioner and EF resisted disclosure — on the

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<sup>20</sup> *AB v CD* [2019] VSCA 28, [7].

<sup>21</sup> *Ibid* [8], [11].

<sup>22</sup> *Ibid* [11].

<sup>23</sup> *Open Courts Act 2013* (Vic) s 4; *AB v CD* [2019] VSCA 28, [65].

<sup>24</sup> *Open Courts Act 2013* (Vic) s 18(1).

<sup>25</sup> *Ibid* ss 18(1)(a), 18(1)(c); *AB v CD* [2019] VSCA 28, [68].

other, every man and his dog wanted her identity known.<sup>26</sup> Despite the parties being seemingly intractable, when it came to EF's children the influence of everyone's humanity began to blur those lines. None of the DPP, the Commonwealth DPP nor the *amici curiae* opposed the application in respect of the children.<sup>27</sup> Counsel representing the Royal Commission only made limited submissions on the issue, simply acknowledging that the children's names were not relevant to its inquiry, nor did they need to be disclosed.<sup>28</sup> In stark contrast, the media parties,<sup>29</sup> for whatever reason, opposed the application in spite of their submission that

it was unlikely that media interests would wish to publish those details in connection with publication of the subject matter of the present proceedings.<sup>30</sup>

This was the situation with which the Court of Appeal was faced. Of the seven parties making submissions, only one actively opposed non-publication orders being made in respect of the children.

The crucial issue in all the applications was whether the orders were *necessary*. Yet, despite that significance, if you were not paying attention you might have missed their Honours' fleeting discussion of the meaning of the term. Their Honours considered that 'necessary' required a 'high standard of satisfaction', a standard that could not be met if it was merely 'reasonable' to make the order.<sup>31</sup>

That then brings us to the determinative question — was a suppression order necessary to protect the safety of the children? The Court of Appeal's answer to that question was, at times, both internally contradictory and at odds with the evidence presented. To begin, in deliberating the necessity of the order, their Honours considered the safety of EF and her children together. For their Honours, there was 'no doubt that EF is at considerable risk (and that her children are likely to also be at risk)'.<sup>32</sup> Against that, their Honours emphasised two countervailing considerations. First, that while a lack of a non-publication order might increase publications about EF, those with the most interest in harming her already knew her name. Secondly, that there

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<sup>26</sup> By this time the DPP, the Commonwealth Director of Public Prosecutions ('Commonwealth DPP') (intervening), the *amici curiae* for the convicted persons, the Royal Commission (intervening) and certain media parties (intervening) all made submissions opposing the applications: *AB v CD* [2019] VSCA 28, [12] (Ferguson CJ, Beach and McLeish JJA).

<sup>27</sup> *Ibid* [34], [39], [56].

<sup>28</sup> *Ibid* [48].

<sup>29</sup> The media parties included a varied mix of News Corp Australia companies (Herald & Weekly Times Pty Ltd and Nationwide News Pty Ltd), Nine/Fairfax Media's The Age Company Ltd and Seven Network (Operations) Ltd. It is standard practice under the legislation to notify relevant news media organisations of an application for a suppression order: *Open Courts Act 2013* (Vic) s 11(1).

<sup>30</sup> *AB v CD* [2019] VSCA 28, [52].

<sup>31</sup> *Ibid* [68].

<sup>32</sup> *Ibid* [73].

was no evidence of any actual attempt of harm against EF or her children.<sup>33</sup> For those reasons, their Honours were not satisfied that the orders were ‘necessary’ to protect the safety of EF or her children.<sup>34</sup> This finding was despite hearing and acknowledging the unchallenged opinions of senior police officers that

if the disclosures CD wished to make to convicted persons were made then the risk of death to EF would become ‘almost certain’ ...<sup>35</sup>

Unnecessary indeed. Even if their Honours had concluded otherwise, the outcome in respect of EF would not have changed. Their Honours considered that s 18(1)(c) contained a discretion, and that ‘powerful countervailing considerations regarding the proper administration of justice’ would have swayed that discretion against making an order, even had their Honours considered it necessary to protect EF’s safety.<sup>36</sup>

Of course, the discussion above concerned not the order sought in respect of the children, but the order sought in respect of EF herself. However, we would expect that the weight given to the evidence concerning the children’s safety would universally apply to both orders. That is especially so given that the Court of Appeal’s consideration of the order specific to the children was only in the briefest of terms. Indeed, their Honours added only two additional points against the granting of the order — that there was no threatened publication of the children’s names or images; and that the Court had already made orders redacting their names from judgments and other documents obtainable from the Court’s file.<sup>37</sup> Their Honours concluded by saying that

at present we are unable to see any legitimate public interest in the publication of the identities and details of EF’s children in connection with the subject matter of the proceedings.<sup>38</sup>

Notwithstanding this conclusion, and quite incredibly, the Court of Appeal was not satisfied that an order was ‘necessary’ for the purposes of s 18(1)(c) and so refused EF’s application to suppress the names of her children.<sup>39</sup>

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<sup>33</sup> Ibid [75].

<sup>34</sup> Ibid [76].

<sup>35</sup> Ibid [75].

<sup>36</sup> Ibid [78]. The Court of Appeal’s discussion of those countervailing considerations (at [69]–[72]) although relevant to the application in respect of EF, could not be relevant to that concerning her children.

<sup>37</sup> Ibid [85].

<sup>38</sup> Ibid [86].

<sup>39</sup> Ibid [87], [89]–[90].

### C *Children of Relatively Tender Years*

Unlike the Court of Appeal, Nettle J in the High Court was presented with only one issue — EF’s application for orders pursuant to s 77RE of the *Judiciary Act 1903* (Cth) (*‘Judiciary Act’*) to prohibit publication of the names and images of her children.<sup>40</sup> The reliance on that section demonstrates that EF was not appealing from the Court of Appeal’s decision, but rather was making a separate and distinct application to the High Court under different statutory provisions.<sup>41</sup> The confining of the issues also meant that Nettle J was not required to undertake any balancing of the competing considerations regarding the disclosure of EF’s identity, for no application in respect of EF was before his Honour.

Section 77RE provides the High Court with a power very similar to that granted by s 17 of the *Open Courts Act 2013* (Vic). The similarities continue in s 77RF of the *Judiciary Act*, where the grounds on which the High Court may make such an order include where

the order is necessary to protect the safety of any person.<sup>42</sup>

Not only did Nettle J face a similar test to the Court of Appeal, but his Honour faced ‘[s]ubstantially the same evidence’.<sup>43</sup> However, here we see the similarities end. The first of the differences, and the first in the steps that led Nettle J to a different conclusion than the Court of Appeal, was in the interpretation of ‘necessary’. Much like the Court of Appeal, Nettle J considered that ‘necessary’ meant more than merely convenient, reasonable or sensible.<sup>44</sup> Yet his Honour went further and considered that ‘necessary’ in this context required

satisfaction on the balance of probabilities that the order is necessary to protect the person’s safety, the latter being a conclusion informed by the nature, imminence and degree of likelihood of apprehended harm.<sup>45</sup>

To his Honour’s mind, an order would be necessary if, without it, ‘the risk of prejudice to the safety of the person would range above the level that can reasonably be regarded as acceptable’.<sup>46</sup>

It was put to Nettle J that his Honour would face great difficulty in concluding that an order was necessary given the Court of Appeal’s clear findings that it was not.<sup>47</sup>

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<sup>40</sup> *AB (a pseudonym) v CD (a pseudonym)* (2019) 364 ALR 202, 203 [1] (Nettle J).

<sup>41</sup> *Ibid* 204 [6].

<sup>42</sup> *Judiciary Act 1903* (Cth) s 77RF(1)(c).

<sup>43</sup> *AB (a pseudonym) v CD (a pseudonym)* (2019) 364 ALR 202, 203 [3] (Nettle J).

<sup>44</sup> *Ibid* 205 [14].

<sup>45</sup> *Ibid*.

<sup>46</sup> *Ibid* 206 [15].

<sup>47</sup> *Ibid* 206 [16].

Although his Honour dutifully expressed some hesitation in departing from those findings, he reasoned that there were ‘compelling considerations’ that justified doing so.<sup>48</sup> There are no surprises in what his Honour found compelling — the unchallenged opinion evidence of the senior police officers regarding the risk of harm; that the children were of ‘relatively tender years’; and the evidence that disclosure would undermine the effectiveness of police protection.<sup>49</sup> Unlike the Court of Appeal, his Honour was not persuaded by the idea that those affected by EF’s conduct could have easily ascertained her and her children’s identities — certainly not to the extent that it would undermine the other considerations. His Honour also placed greater weight on the lack of any public interest in disclosure of the children’s identities, and the lack of opposition by the other parties to the order.<sup>50</sup>

Justice Nettle was therefore satisfied that it was necessary to make the order to protect the safety of the children. On balance, his Honour considered that a period of 15 years was appropriate.<sup>51</sup>

### III DEPARTURE

#### A *Unless Plainly Wrong*

It is no accident that the provisions of the *Open Courts Act 2013* (Vic) and the *Judiciary Act 1903* (Cth) are so similar. In 2010, the Standing Committee of Attorneys-General developed model legislation on suppression orders to ensure uniformity of decision-making across Australia.<sup>52</sup> That uniformity invites consideration of *ASC v Marlborough Gold Mines* (‘*Marlborough Gold Mines*’), where the unanimous High Court emphasised the importance of consistent interpretation of uniform legislation.<sup>53</sup> Indeed, the High Court’s remarks have since been applied in the context of the suppression order regime.<sup>54</sup>

As the Court of Appeal and Nettle J reached starkly different conclusions, the question arises whether there is a uniform line of interpretation on orders necessary to protect the safety of persons and, if so, whether either decision was consistent with those authorities.

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<sup>48</sup> Ibid.

<sup>49</sup> Ibid 206–7 [17]–[20].

<sup>50</sup> This is with the exception of The Age, which made strong submissions against EF’s application: ibid 207 [20] (Nettle J).

<sup>51</sup> Ibid 207 [21].

<sup>52</sup> See Explanatory Memorandum, Access to Justice (Federal Jurisdiction) Amendment Bill 2011 (Cth) 2.

<sup>53</sup> *Australian Securities Commission v Marlborough Gold Mines Ltd* (1993) 177 CLR 485, 492.

<sup>54</sup> See, eg, *Roberts-Smith v Fairfax Media Publications Pty Ltd* [2018] FCA 1943, [28]–[29] (Bromwich J).

As is too often the way in a common law system, the courts have identified two competing approaches to determining what is ‘necessary’. The first, termed the ‘probable harm’ approach, requires the applicant to demonstrate that it would be more probable than not, absent the order, that the relevant person would suffer harm.<sup>55</sup> We can see that such an approach requires the probability of harm to be established as a *precondition* to the grant of the order. Conversely, the ‘calculus of risk’ approach invites consideration of the nature, the imminence and degree of likelihood of the harm.<sup>56</sup> Under this approach, if the nature of the harm is severe (for example, death), then an order may be necessary even if there is only a mere possibility of the harm arising.

The latter approach is no doubt preferable given that the former is liable to produce anomalous results.<sup>57</sup> Justice Besanko gave an example:

It would seem incongruous to have a test which finds an order where it is probable an assault will occur, but not in a case where there is a 49% risk of a death occurring.<sup>58</sup>

Justice Nettle clearly preferred and applied the ‘calculus of risk’ approach.<sup>59</sup> Had the Court of Appeal done the same, it is difficult to see how their Honours could have arrived at the conclusion that they did. Instead, their Honours implicitly adopted the ‘probable harm’ approach by giving little weight to the unchallenged police evidence that the risk of death to EF was ‘almost certain’.<sup>60</sup> Evidently such an approach fails to consider the *nature* of the harm that would have befallen the children, namely, the risk of death. More importantly, the approach signals a departure from the reasoned decisions of other intermediate appellate and first instance courts in a manner contrary to *Marlborough Gold Mines*.

But the effects of ignoring the High Court’s plea for consistency and uniformity are not merely confined to the theory. The dangers of not heeding their Honours’ warning are tangibly illustrated by the divergence in approach between the Court of Appeal and Nettle J. Here, on largely the same evidence, the two Courts have arrived

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<sup>55</sup> *AB (a pseudonym) v The Queen [No 3]* [2019] NSWCCA 46, [56] (Hoeben CJ at CL, Price and Adamson JJ); *DI v PI* [2012] NSWCA 314, [49] (Bathurst CJ).

<sup>56</sup> *AB (a pseudonym) v The Queen [No 3]* [2019] NSWCCA 46, [56]; *DI v PI* [2012] NSWCA 314, [51] (Bathurst CJ).

<sup>57</sup> The ‘calculus of risk’ approach has been adopted in *Hamzy v The Queen* [2013] NSWCCA 156, [60] (Harrison J, with whom Beech-Jones J agreed); *Roberts-Smith v Fairfax Media Publications Pty Ltd* [2019] FCA 36, [17] (Besanko J). The following decisions, handed down after the Court of Appeal’s judgment, have also adopted the ‘calculus of risk’ approach: *AB (a pseudonym) v The Queen [No 3]* [2019] NSWCCA 46, [58]; *Brown (a pseudonym) v The Queen [No 2]* [2019] NSWCCA 69, [37]–[38] (Payne JA, Johnson and N Adams JJ).

<sup>58</sup> *Roberts-Smith v Fairfax Media Publications Pty Ltd* [2019] FCA 36, [17] (Besanko J).

<sup>59</sup> *AB (a pseudonym) v CD (a pseudonym)* (2019) 364 ALR 202, 205 [14] (Nettle J).

<sup>60</sup> *AB v CD* [2019] VSCA 28, [75] (Ferguson CJ, Beach and McLeish JJA).

at completely opposing conclusions. The immediate problem emerges in the application of *stare decisis* — which decision should be followed? As a later Court of Appeal has already acknowledged, Nettle J's decision as a single judge is not binding.<sup>61</sup> In Victoria, any court — barring the Court of Appeal — will be bound by the Court of Appeal's decision to refuse the applications. For the Victorian courts, therefore, the way forward is simple — follow the decision of the Court of Appeal. By contrast, one cannot help but feel sympathetic towards a judge of another jurisdiction forced to decide between following Nettle J in the High Court, or the unanimous Court of Appeal.

### B *Keen Revelations*

The above analysis views the two decisions through a legal lens. However, there is little utility in examining the legal aspects of the case divorced from the people involved, as the law is only relevant in the context of its humanity.

That brings us to the focal point of both decisions — the protection of children. The special place of children under the law has long been recognised. Their welfare is the 'dominant matter',<sup>62</sup> the 'first and paramount consideration',<sup>63</sup> a consideration that has evolved into an 'important and salutary principle of substantive law'.<sup>64</sup> On the justification for those principles, I can do no better than quote Bell J:

Children are ends in themselves and not the means of others. They form part of the family, the fundamental group unit of society. Children bear rights personally, and are entitled to respect of their individual human dignity. The views of children should be given proper consideration in relation to matters affecting them. Children are especially entitled to protection from harm, and to human development.<sup>65</sup>

The paramountcy of the protection and welfare of children may necessitate, in situations where children are especially vulnerable, the suppression of their identities. The situations in which Parliament has required suppression are hardly surprising

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<sup>61</sup> *AB v CD [No 2]* [2019] VSCA 95, [12] (Ferguson CJ, Beach and McLeish JJA). See also *Businessworld Computers Pty Ltd v Australian Telecommunications Commission* (1988) 82 ALR 499, 504 (Gummow J); *MMAL Rentals Pty Ltd v Bruning* (2004) 63 NSWLR 167, 184 [94] (Spigelman CJ, with whom Mason P and Hodgson JA agreed).

<sup>62</sup> *In re McGrath (Infants)* [1893] 1 Ch 143, 148 (Lindley LJ).

<sup>63</sup> *In re Adoption Application 41/61* [1963] Ch 315, 329 (Danckwerts LJ, with whom Ormerod LJ agreed).

<sup>64</sup> *Northern Territory v GPAO* (1999) 196 CLR 553, 584 [65] (Gleeson CJ and Gummow J).

<sup>65</sup> *Secretary to the Department of Human Services v Sanding* (2011) 36 VR 221, 227 [11] (Bell J).

and include: where a child's safety requires protection or removal;<sup>66</sup> where a child is charged and tried for a criminal offence;<sup>67</sup> and where a child is in the care of the State or Territory.<sup>68</sup>

By the above I seek to emphasise two points: that the courts appropriately place the welfare of children as the paramount consideration; and that statutory suppression of children's identities is a common occurrence. Yet, amidst that background, none of which can be said to be particularly novel, the Court of Appeal failed to accord paramouncy to the welfare of EF's children. Their Honours failed to suppress the children's identities in the way that courts across the country have done time and again. The risk of harm to the children was not afforded any separate consideration beyond that incidental to the risk to EF herself. By approaching the issue in that way, their Honours flipped Bell J's declaration on its head and treated the children not as an end in themselves, but as the means of EF.

#### IV A TROUBLING DICHOTOMY

I remarked above that we all hold a basic assumption that society will protect its children as a paramount consideration. In a number of ways, it appears that the Court of Appeal failed to give the safety of EF's children that paramouncy — a failure rendered even more stark by Nettle J's efforts to do just that. The inherent conflict between the two decisions raises a number of legal issues in the granting of suppression orders. But more than that, if we take Mandela's view, they offer keen revelations of how the courts will treat our children.

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<sup>66</sup> See, eg, *Criminal Code 2002* (ACT) s 712A(1); *Family Violence Act 2016* (ACT) s 149(1); *Care and Protection of Children Act 2007* (NT) s 97; *Child Protection Act 1999* (Qld) ss 189, 193–4; *Children and Young People (Safety) Act 2017* (SA) s 162.

<sup>67</sup> See, eg, *Criminal Code 2002* (ACT) s 712A(1); *Children and Young Persons (Care and Protection) Act 1998* (NSW) s 105(1); *Youth Justice Act 2005* (NT) ss 43(2)–(3), 50(1); *Youth Justice Act 1992* (Qld) s 301(1); *Young Offenders Act 1993* (SA) ss 13(1), 63C(1); *Youth Justice Act 1997* (Tas) ss 31, 108; *Children, Youth and Families Act 2005* (Vic) s 534(1); *Children's Court of Western Australia Act 1988* (WA) ss 35–6.

<sup>68</sup> See, eg, *Children and Young Persons (Care and Protection) Act 1998* (NSW) s 105(1AA).



**CALCULATING CULTURAL LOSS AND  
COMPENSATION IN NATIVE TITLE:  
*NORTHERN TERRITORY V GRIFFITHS*  
(2019) 364 ALR 208**

Decision-making in native title decisions has been described as a ‘question of how much chaos a judge is willing to tolerate’.<sup>1</sup> This ‘chaos’ stems from the irreconcilable nature of applying Western concepts of land ownership to the metaphysical, non-economic relationship with land that sustains many Indigenous Australians. It is a difficult task for any court to consider the two together. This observation rings true when considering the High Court’s decision in *Northern Territory v Griffiths*,<sup>2</sup> regarding the ongoing question of the nature and amount of compensation payable for the loss and impairment of native title rights. When decided at first instance, Mansfield J’s award of compensation was the first such award to be judicially determined under the *Native Title Act 1993* (Cth) (‘the Act’). The High Court’s judgment on appeal is therefore the most authoritative statement to date as to how native title compensation is to be quantified.

Three elements to compensation were identified: economic loss, interest, and non-economic, or ‘cultural’ loss. How to determine an award for each was considered at length in the plurality judgment (Kiefel CJ, Bell, Keane, Nettle and Gordon JJ). In separate minority judgments, Gageler J and Edelman J agreed with the plurality as to the orders that should be made, but with divergent reasoning. The entire Court therefore agreed that the compensation should include an award for economic loss valued at 50% of the freehold value of the land, with simple interest applied, as well as an award of \$1.3 million for the cultural loss suffered by the Ngaliwurru and Nungali Peoples (the ‘Claim Group’).

The decision establishes a precedent for the use of a bifurcated approach to native title compensation, incorporating consideration of both economic and, for the first time, cultural loss. The introduction of this additional head of compensation reflects

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\* BA (Adel), LLB Candidate (Adel); Student Editor of the *Adelaide Law Review* (2019).

\*\* BA (Adel), Hons LLB Candidate (Adel); Student Editor of the *Adelaide Law Review* (2019).

<sup>1</sup> Kinglsey Palmer, ‘Societies, Communities and Native Title’ (2009) 4(1) *Land, Rights, Laws: Native Title Research Unit* 1, 2.

<sup>2</sup> (2019) 364 ALR 208 (‘*Griffiths*’).

the important and unique relationship between many Indigenous Australians and the land on which they have historically resided for up to 60,000 years.<sup>3</sup>

However, underpinning all three aspects of the *Griffiths* decision is the significant tension that has existed in native title law since *Mabo* was decided.<sup>4</sup> Despite rejecting terra nullius as a legal fiction, the High Court in 1992 validated Australian sovereignty as having been legally established through British colonisation. Some have said that this was done out of fear that to do otherwise would ‘fracture the Australian legal system’.<sup>5</sup> The two concepts of native title and Australian sovereignty were held to ‘co-exist’ through the Crown’s all-encompassing radical title, subject only to claims of un-extinguished native title.<sup>6</sup> However, the recognition of Indigenous connections to land that was accepted in *Mabo* requires validation through Western property law concepts such as ‘continuity’ and ‘exclusivity’ of occupation, effectively perpetuating the assumptions underlying terra nullius.<sup>7</sup> The High Court thus limited future native title determinations to the application of potentially inappropriate Western property law concepts to assess native title claims. Therefore, while the recent *Griffiths* judgment *ex facie* appears progressive, by deciding to remain within the boundaries of native title established by *Mabo*, it remains constrained from considering a more holistic and truthful valuation of the relationship between first Australians and their country — raising the question of whether the decision in *Griffiths* merely represents a more favourable, but ongoing, legal fiction.

## I BACKGROUND AND APPEAL HISTORY

### A *The Ngaliwurru and Nungali Peoples*

The Ngaliwurru and Nungali Peoples have lived in and around Timber Creek for ‘as long, probably, as Aboriginal people have occupied the continent’.<sup>8</sup> Timber Creek is a region of gorges and escarpments, rivers and creeks, red rocks and plains, styled centuries ago by volcanic activity and erosion.<sup>9</sup> The Dreaming of the Ngaliwurru and Nungali Peoples is present throughout the area; the *Wirip*, a dingo who travelled the

<sup>3</sup> Referendum Council, *Uluru Statement From the Heart* (26 May 2017) <<https://www.referendumcouncil.org.au/final-report.html#toc-anchor-ulurustatement-fromthe-heart>> (‘Uluru Statement’).

<sup>4</sup> *Mabo v Queensland [No 2]* (1992) 175 CLR 1 (‘*Mabo*’).

<sup>5</sup> Irene Watson, ‘Buried Alive’ (2002) 13(1) *Law and Critique* 253, 259.

<sup>6</sup> *Mabo* (n 4) 48–51.

<sup>7</sup> *Ibid* 51, 59–60. See Watson (n 5).

<sup>8</sup> Jacob Saulwick, ‘The High Court Has Listened to Aboriginals, so too Must Politicians’, *Sydney Morning Herald* (online, 16 March 2019) <<https://www.smh.com.au/national/the-high-court-has-listened-to-aboriginal-people-so-must-politicians-20190314-p514bg.html>>.

<sup>9</sup> *Ibid*.

Timber Creek area, remains under the rocks of a creek running through the valley.<sup>10</sup> The Peoples have hunted, fished and foraged in the region for years, using the land's natural resources for physical and spiritual sustenance.<sup>11</sup> They have an extensive system of rights and obligations to country, which pass through descent, and which require non-Indigenous persons to seek permission for entry.<sup>12</sup>

In 1825, the British Crown claimed sovereignty over the entire Northern Territory, but it was not until the mid-1800s that they explored Timber Creek. By the end of the 19<sup>th</sup> century, a number of pastoral leases were granted in the district. In 1975 the township of Timber Creek was proclaimed under the *Crown Lands Act 1931* (NT).<sup>13</sup> Between 1980 and 1996, the Northern Territory was responsible for 53 grants of tenure and public works which impaired or extinguished the Claim Group's native title,<sup>14</sup> and some of which threatened harm to Dreaming sites.<sup>15</sup>

### B *The Initial Decision and Appeals*

Following proceedings begun in 1999, the Claim Group were found to have eight non-exclusive native title rights and interests over a large area of land in Timber Creek.<sup>16</sup> In 2011, they made a claim for compensation under s 61(1) of the Act for the impairment of these rights.<sup>17</sup> The 53 compensable acts affecting the Claim Group's native title consisted of both grants of tenure and public works, such as the building of roads.<sup>18</sup> The native title rights and interests these acts affected included the right to move about the relevant area, the right to hunt, fish and forage, and the right to conduct cultural ceremonies, including burial rights, on the land.<sup>19</sup>

Having identified the specific native title rights that had been affected by the compensable acts, Mansfield J in the Federal Court initially awarded economic compensation of an amount worth 80% of the freehold value of the land.<sup>20</sup> His Honour then ruled that simple interest was payable on this amount, to be calculated from the time of extinguishment until the time of judgment.<sup>21</sup> Finally, his Honour awarded \$1.3 million in compensation for non-economic loss, an award that was described

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<sup>10</sup> *Griffiths* (n 2) 260–1. The importance of this ‘Dingo Dreaming’ to the Claim Group was emphasised in the reasons of Mansfield J at first instance, emphasis with which the plurality judgment agreed: see below (n 78).

<sup>11</sup> *Ibid* 214–15 [10].

<sup>12</sup> *Ibid* 258 [168].

<sup>13</sup> *Ibid* 213 [5].

<sup>14</sup> *Ibid* [6].

<sup>15</sup> *Ibid* 260 [178].

<sup>16</sup> *Ibid* 214 [7]; *Griffiths v Northern Territory* (2007) 165 FCR 391.

<sup>17</sup> *Griffiths* (n 2) 214 [8].

<sup>18</sup> *Ibid* 213 [6].

<sup>19</sup> *Ibid* 214–15 [10].

<sup>20</sup> *Ibid* 215 [12].

<sup>21</sup> *Ibid* 215 [12], 280 [269].

as a ‘solatium’.<sup>22</sup> On appeal to the Full Court of the Federal Court, the quantum of compensation for economic loss was reduced to 65% of the freehold value.<sup>23</sup> Specifically, the Full Court considered that the economic value of the native title rights and interests should be further discounted to reflect the fact that they were (nominally) inalienable, which would reduce their value to a hypothetical ‘willing but not anxious’ purchaser.<sup>24</sup>

The appeal to the High Court was made on various grounds by each of the parties. All parties accepted that the ‘bifurcated approach’ of economic and non-economic loss should be maintained.<sup>25</sup> The Claim Group submitted that the compensation for economic loss awarded should have been the full value of freehold title, without reduction,<sup>26</sup> and that compound interest should have been awarded.<sup>27</sup> Both the Northern Territory and the Commonwealth appealed on the basis that economic loss compensation should have been calculated as 50% of the freehold value,<sup>28</sup> and that the award of compensation for non-economic loss should have been reduced by the Full Court as it was ‘manifestly excessive’.<sup>29</sup> Given the extensive grounds of appeal, it was essentially open to the High Court to reconsider each element of the compensation award. Their Honours’ decision, and a critique thereof, is the focus of this case note.

## II DETERMINING ECONOMIC LOSS

The Act entitles claimants who hold native title rights and interests to compensation for any ‘loss, diminution, impairment or other effect’ of a compensable act affecting those rights and interests.<sup>30</sup> The relevant section provides that such compensation is to be on ‘just terms’.<sup>31</sup> This is supplemented by s 51A, which provides that the total compensation payable for an act extinguishing all native title is not to exceed the freehold value of the relevant land.<sup>32</sup> However, this section is subject to the s 53 requirement of ‘just terms’ — meaning that where the operation of s 51A would

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<sup>22</sup> A typical additional award of non-economic compensation in compulsory acquisitions: *ibid* 216 [12]; *Griffiths v Northern Territory (No 3)* 337 ALR 362, 417 [300].

<sup>23</sup> *Griffiths* (n 2) 216 [13].

<sup>24</sup> *Ibid* 227 [64]; *Northern Territory v Griffiths* (2017) 256 FCR 478, 520 [135]–[139].

<sup>25</sup> *Griffiths* (n 2) 233 [84].

<sup>26</sup> *Ibid* 216 [15].

<sup>27</sup> *Ibid*.

<sup>28</sup> *Ibid* 216–17 [16]–[17].

<sup>29</sup> *Ibid*.

<sup>30</sup> *Native Title Act 1993* (Cth) s 51(1).

<sup>31</sup> *Ibid* ss 51(1), 53.

<sup>32</sup> *Ibid* s 51A.

result in the acquisition of property being other than on ‘just terms’, the Act works to prevent this occurring, to ensure the constitutional validity of the section.<sup>33</sup>

Based on this legislative framework, the High Court proceeded from the basis that the value of compensation is to be determined as a reduction of freehold value, based on the value of the specific native title rights and interests lost or impaired.<sup>34</sup> It was also an agreed fact in the proceedings that the compensation would be determined based on the date at which the native title was found to have been extinguished by the compensable acts.<sup>35</sup> The plurality considered that, while ‘exclusive’ native title rights could not be directly compared to freehold title, they similarly could be understood through the ‘bundle of rights’ conception.<sup>36</sup> The Claim Group argued that scaling compensation in this way was contrary to s 10(1) of the *Racial Discrimination Act 1975* (Cth).<sup>37</sup> The plurality rejected this argument on the basis that to equate exclusive native title rights with full freehold title was to treat ‘like as like’.<sup>38</sup>

The plurality found that the 80% and 65% awards of the trial and appeal judges were manifestly excessive, over-valuing the nature of the specific native title rights and interests the Claim Group held.<sup>39</sup> Crucially, their Honours noted that the native title that was held was essentially ‘usufructuary, ceremonial and non-exclusive’.<sup>40</sup> It did not include formal rights to admission, exclusion or commercial exploitation and thus, could not be worth more than 50% of the freehold value.<sup>41</sup> For applicants in future native title compensation matters, then, it can be assumed that economic compensation will be determined by the nature of the rights and interests they have lost, and how proximate they are to full, exclusive, native title rights.

The idea that compensation should be based on the freehold value of the land is controversial. Lavarch and Riding criticise the freehold approach as wrongly assuming that a market value can be determined for native title.<sup>42</sup> Indeed, the High Court’s unquestioned adoption of the equivalency between full freehold title and exclusive native title rights demonstrates the ongoing conflict within native title since *Mabo*. The plurality’s use of exclusivity of possession as a tool in determining compensation

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<sup>33</sup> Ibid s 53; *Griffiths* (n 2) 224 [49]. Section 53 of the *Native Title Act* ensures that any acquisition of land under the Act does not offend the ‘just terms’ principle found in s 51(xxxi) of the *Constitution*.

<sup>34</sup> *Griffiths* (n 2) 229 [70].

<sup>35</sup> Ibid 225 [56].

<sup>36</sup> Ibid 228–9 [68].

<sup>37</sup> Ibid 229–30 [71].

<sup>38</sup> Ibid 230 [74].

<sup>39</sup> Ibid 240 [106].

<sup>40</sup> Ibid.

<sup>41</sup> Ibid.

<sup>42</sup> Michael Lavarch and Allison Riding, ‘A New Way of Compensating: Maintenance of Culture Through Agreement’ (Issues Paper No 21, Native Title Research Unit, April 1998) 4.

was justified as a ‘consistent’, and ‘conventional’ approach, one which avoided the adversarial use of valuation reports.<sup>43</sup> However, the use of this Western test of valuation ignores the different relationship that Indigenous peoples may have with land, one in which ‘exclusivity’ of occupation is less relevant:

There exists different ways of knowing what is law, for example Nunga [Aboriginal] relationships to ruwi [land] are more complex than owning and controlling a piece of property ... [under the law of the coloniser] the land becomes enslaved and a consumable which is traded or sold in and out of existence. We are the natural world; it is a mirror of our self, our Nunganness, so how can we sell our self ... We nurture ruwi as we do our self, for we are one.<sup>44</sup>

This results in lower assessments of value for persons such as the Claim Group, whose land use was found to be ‘usufructuary, ceremonial and non-exclusive’,<sup>45</sup> thus reducing the percentage of full freehold value they were entitled to. Claim groups are constrained from obtaining an appropriate assessment of economic value by the very system that purports to realise that value. In Irene Watson’s words:

Native title is extinguishment. Extinguishment is genocide.<sup>46</sup>

Others have taken the view that this inequity created through the freehold approach is to be remedied through the award of compensation for non-economic loss<sup>47</sup> — which may be more significant for Indigenous nations whose native title rights are in rural areas where land value is lower.<sup>48</sup> The plurality accepted that compensation for economic loss would be higher in ‘developed’ areas of Australia,<sup>49</sup> however they failed to note that in these more ‘developed’ areas, potential claim groups will likely be unable to prove exclusivity of possession. The plurality judgment can be problematised as Eurocentric, forcing Western economic concepts onto native title rights and interests that cannot properly be understood in this way.<sup>50</sup>

The plurality found that such criticism was ‘misplaced’ because the value of extinguished native title rights and interests must be determined through an ‘objective’

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<sup>43</sup> *Griffiths* (n 2) 236 [92].

<sup>44</sup> Watson (n 5) 256.

<sup>45</sup> *Griffiths* (n 2) 240 [106].

<sup>46</sup> Watson (n 5) 256.

<sup>47</sup> Paul Burke, ‘How Can Judges Calculate Native Title Compensation?’ (Discussion Paper, Native Title Research Unit, 2002) 4.

<sup>48</sup> *Ibid* 1; Wanjie Song, ‘What’s Next for Native Title Compensation: The De Rose Decision and the Assessment of Native Title Rights and Interest’ (2014) 8(10) *Indigenous Law Bulletin* 11, 12; *Griffiths* (n 2) 238 [98].

<sup>49</sup> *Griffiths* (n 2) 236–7 [95].

<sup>50</sup> See, eg, Watson’s criticisms of native title as a furthering of the colonial project: Watson (n 5).

inquiry.<sup>51</sup> However the concept of ‘objectivity’ is inherently a matter of context: ‘for the people in the Tanami region in the western Northern Territory, “Canberra is a very remote place indeed”’.<sup>52</sup> By using the *Spencer* test of the ‘willing but not anxious’ purchaser and vendor,<sup>53</sup> the Court applied a concept removed from a conception of property law that cannot necessarily be imported into Indigenous understandings of land.

The plurality judgment acknowledged that a market for native title rights and interests cannot actually exist,<sup>54</sup> conceding that there was a ‘degree of artificiality’<sup>55</sup> in determining economic loss through the lens of the *Spencer* test. This view was not shared by Gageler J in his Honour’s minority opinion, who felt that the value of the native title rights could accurately be determined in this way.<sup>56</sup> Based on this, his Honour agreed that the proper value of the native title rights and interests lost was 50% of the freehold value.<sup>57</sup> Given s 51A of the Act directly pins the economic value of native title to its freehold, the approach of all Justices of the Court is not surprising. It therefore falls to the question of non-economic loss to ensure compensation is actually awarded on just terms.

### III THE MATTER OF INTEREST

Because compensation for economic loss was valued at the date of extinguishment, the Claim Group sought an award of interest on top of this amount. They argued that the ‘just terms’ requirement allows for the importation of equitable concepts into how such an award should be calculated, and that it was ‘inequitable for the Northern Territory’ to profit from the compensable acts.<sup>58</sup> This formed the basis of their claim for compound interest, both at first instance and on appeal. However, this argument was rejected for a number of reasons. The Court instead agreed with an award of simple interest.

The plurality noted that, by virtue of the Act’s retrospective validation of extinguishing acts, the Northern Territory’s profits from the land could not be said to have been obtained by fraud or any similar equitable basis for compound interest.<sup>59</sup> They also found that it was unlikely the Claim Group would have invested the money had they

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<sup>51</sup> *Griffiths* (n 2) 237 [96].

<sup>52</sup> Michael Dodson, ‘Indigenous Culture and Native Title’ (1996) 21(1) *Alternative Law Journal* 2, 5.

<sup>53</sup> *Griffiths* (n 2) 234 [85]. See generally, *Spencer v The Commonwealth* (1907) 5 CLR 418.

<sup>54</sup> *Griffiths* (n 2) 234 [85].

<sup>55</sup> *Ibid* 234 [85].

<sup>56</sup> *Ibid* 275 [246].

<sup>57</sup> *Ibid* 276 [250].

<sup>58</sup> *Ibid* 241 [112].

<sup>59</sup> *Ibid* 248 [132].

been compensated at the time of extinguishment — which would also have been grounds for an award of compound interest.<sup>60</sup> The latter point is once again representative of the issues facing applicants in translating their Indigenous practices into the Western economic system. Following the initial decision of Mansfield J in the Federal Court, it was noted that the Claim Group were ‘significantly disadvantaged ... for their commitment to cultural traditions of sharing native title’ rather than demonstrating a ‘more European’ willingness to invest their compensation.<sup>61</sup> This is yet another example of detriment being caused to the Claim Group through the courts’ attempt to translate foreign legal concepts into native title law.

It was explained that the purpose of compensation was to ‘put the Claim Group, so far as money can do, in the position in which they would have been if the native title had not been extinguished’.<sup>62</sup> This did not allow an award for restitution of any profit or benefit accrued by the Northern Territory in extinguishing and impairing native title.<sup>63</sup> It also assumes that monetary compensation can go at least some way towards addressing the losses suffered by the Claim Group. However, for applicant groups, what may actually be desired is an ability to continue important cultural practices, maintain a relationship with country, and promote cultural education and language revival.<sup>64</sup> Once again, the tensions that arise from attempting to translate native title rights and interests into the existing Western legal system are apparent.

#### IV VALUING CULTURAL LOSS

The decision then turned to the issue of compensation for non-economic loss. Until the High Court decision in *Griffiths*, this component had been described as a ‘solatium’.<sup>65</sup> Indeed, such an award had long been considered a potential means for compensation to more accurately reflect the significant non-economic loss suffered by native title holders.<sup>66</sup> However, difficulties have been noted with this approach given the likelihood (as occurred in *Griffiths*) that non-economic loss compensation would exceed that awarded for economic loss.<sup>67</sup> The plurality held that a more appropriate term was ‘cultural loss’;<sup>68</sup> as to consider the case in the terms of compulsory

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<sup>60</sup> Ibid 248–9 [133].

<sup>61</sup> Fiona Martin, ‘Compensation for Extinguishment of Native Title: *Griffiths v Northern Territory* Represents a Major Step Forward for Native Title Holders’ (2016) 8(27) *Indigenous Law Bulletin* 8, 10.

<sup>62</sup> *Griffiths* (n 2) 249–50 [136].

<sup>63</sup> Ibid.

<sup>64</sup> Tracy Nau, ‘Looking Abroad: Models of Just Compensation Under the *Native Title Act*’ [2009] 93 *Reform Native Title* 55, 56, Lavarch and Riding (n 43) 7.

<sup>65</sup> Ibid 280 [269] (Edelman J).

<sup>66</sup> Lavarch and Riding (n 42) 4; Burke (n 47) 6.

<sup>67</sup> Burke (n 47) 8.

<sup>68</sup> *Griffiths* (n 2) 224–5 [52]–[54].

acquisitions would ‘deflect attention’ from the fact that native title rights and interests arise under a ‘different belief system’.<sup>69</sup>

The High Court proceeded on three agreed bases for this award in the appeal: that such an award was appropriate, and should be awarded *in globo*, with the distribution of the award to be decided by the group;<sup>70</sup> that it would consider the Claim Group as a whole because of the complex inter-relationships between group members, rather than being based on the number of native title holders who existed at the time of extinguishment;<sup>71</sup> and that it was to be based on the specific laws and customs observed by the Claim Group.<sup>72</sup>

In reaching a figure of \$1.3 million, the trial judge had first considered the nature and extent of the Claim Group’s relationship with the land, their relevant laws and customs, and the effect of the compensable acts on this connection.<sup>73</sup> His Honour chose not to approach the question of cultural loss through a ‘lot by lot’ approach, because ‘the consequences were necessarily incremental and cumulative’.<sup>74</sup> Four key examples were provided of events that caused significant cultural loss to the Claim Group, including the building of a causeway across the Timber Creek which was said to ‘cut the life out of the Dreaming’.<sup>75</sup> While these acts were non-compensable, they were used as a demonstration of the significant losses the Claim Group had already suffered.<sup>76</sup> The harm to significant sites, the dispossession of the Claim Group’s land, their ongoing emotional pain, restricted access to hunting grounds, and impeded ability to practise traditions and customs, culminated in not only damage to their ability to fulfil their duties to country, but a strong sense of failure to do so.<sup>77</sup>

Justice Mansfield then went on to detail ‘three particular considerations’ he considered significant in determining the award of compensation. First, there had been construction on the path of the Dingo Dreaming, which had caused significant distress.<sup>78</sup> Second, the acts affected the Claim Group’s enjoyment of their rights across a number of related areas, not just the specific location of the acts.<sup>79</sup> Third, each act (including non-compensable acts) was said to have ‘chipped away’ at the area, causing lower enjoyment of the Claim Group’s native title rights as a whole.<sup>80</sup>

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<sup>69</sup> Ibid 225 [53].

<sup>70</sup> Ibid 255 [156].

<sup>71</sup> Ibid 255–6 [157].

<sup>72</sup> Ibid 256 [158].

<sup>73</sup> Ibid 256 [159].

<sup>74</sup> Ibid 257 [165].

<sup>75</sup> Ibid 261 [180].

<sup>76</sup> Ibid.

<sup>77</sup> Ibid 264–5 [194], 266 [200]–[202].

<sup>78</sup> Ibid 266 [200].

<sup>79</sup> Ibid.

<sup>80</sup> Ibid.

He then went on to consider that, given that these specific considerations had been experienced by the Claim Group for some time, the award should be made for an assessment of loss likely to be felt into the future.<sup>81</sup> The plurality of the High Court agreed that it was appropriate to consider the ‘overall picture’ of loss suffered by the Claim Group.<sup>82</sup> The plurality explained this method at length:

Each act affected native title rights and interests with respect to a particular piece of land. But each act was also to be understood by reference to the whole of the area ... each act put a hole in what could be likened to a single large painting — a single and coherent pattern of belief in relation to a far wider area of land. It was as if a series of holes was punched in separate parts of the one painting. The damage done was not to be measured by reference to the hole, or any one hole, but by reference to the entire work.<sup>83</sup>

The plurality agreed that loss should be measured into the future, because the cultural loss would be ‘permanent and intergenerational’.<sup>84</sup> They also rejected the argument that the figure of \$1.3 million was manifestly excessive, suggesting that it was within what the Australian community would deem as acceptable.<sup>85</sup> Indeed, in his Honour’s separate judgment, Edelman J considered the figure to be conservative, given the significant value of the native title rights and interests to the Claim Group.<sup>86</sup>

It is clear from this reasoning that cultural loss is likely to make up the bulk of any award of compensation for loss of native title. Given the difficulties in determining the economic value of non-exclusive native title rights and interests, this is significant, and potentially lucrative, for future applicants. However, considering economic and cultural loss separately is likely to remain contentious. Throughout the course of the matter, it was made plain that for the Claim Group the ‘ancestral spirits, the people, the country, and everything that exists on it are ... viewed as one indissoluble whole’.<sup>87</sup> Yet Mansfield J’s consideration of the spiritual importance of the rights as adding to their economic value was considered by the plurality judges to be erroneous.<sup>88</sup>

All the Justices of the High Court were keenly aware of the significance of the cultural losses that have been, and continue to be, suffered by the Claim Group, and this element of the judgment is significant. However, the fact that cultural and

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<sup>81</sup> Ibid 268 [207].

<sup>82</sup> Ibid 271 [226].

<sup>83</sup> Ibid 270 [219].

<sup>84</sup> Ibid 272 [230].

<sup>85</sup> Ibid 273–4 [237].

<sup>86</sup> Ibid 294 [328].

<sup>87</sup> Ibid 265–6 [198].

<sup>88</sup> Leonie Flynn, ‘Landmark Timber Creek Native Title Compensation Case’ (2017) 36(2) *Australian Resources and Energy Law Journal* 1, 2; *Northern Territory v Griffiths* (n 24) 514 [111].

economic losses were treated separately at all stages of the matter is representative of the difficulty in apportioning compensation for the extinguishment of native title using legal concepts drawn from a system that, for so long, failed to even recognise the existence of such rights.

## V CONCLUSION

The High Court's decision in *Griffiths* is the clearest guide to date as to how native title compensation claims should be assessed. The Court confirmed that economic and non-economic losses are to be assessed separately. Economic loss is to be assessed 'objectively', requiring the native title rights and interests of the applicants to be a proportion of the value of the land's freehold title, relative to the group's exclusivity of occupation. In *Griffiths*, this was to the detriment of the Claim Group, whose native title rights were considered to be worth at most 50% of freehold value. The Court then confirmed that interest is payable on top of this award, to be restricted to simple interest unless it can be shown there are special circumstances mandating a payment of compound interest. These findings demonstrate the tensions that occur in translating Indigenous legal systems into Western property law concepts. It is these same tensions with which courts making native title determinations have had to grapple since the decision in *Mabo*. While in *Griffiths* the plurality judgment at least seemed aware of the issues caused by applying concepts such as the *Spencer* test in this context, they still maintained this as the correct approach. This was inevitably to the detriment of the Claim Group.

For the Claim Group, it was the award for cultural loss that provided the bulk of their compensation. The separate award of compensation for cultural loss appears to be the preferred solution to the difficulties posed by giving native title rights and interests an 'objective' economic value. Yet assessing the nature and extent of cultural loss is an unenviable task, and the Court did not touch on the question of whether monetary compensation is even appropriate for a loss of this kind. Looking to the future, it will be interesting to see whether courts continue to follow the bifurcated approach, and with it, apply ill-fitting and culturally inappropriate methods of ascertaining economic loss. If this is the case, their ability to attach a monetary sum to something as intangible as cultural loss in future compensation claims will continue to be of vital importance.



**FOOD FOR THOUGHT: AUSTRALIAN  
COMPETITION AND CONSUMER COMMISSION V  
HJ HEINZ COMPANY AUSTRALIA LIMITED**

I INTRODUCTION

In March 2018, HJ Heinz Company Australia Limited ('Heinz') was found to have contravened ss 18 and 29(1)(g) of the *Australian Consumer Law*<sup>1</sup> by representing that its 'Heinz Little Kids fruit & veg SHREDZ' products were beneficial to the health of children aged one to three years. Justice White of the Federal Court ordered Heinz to pay a \$2.25 million pecuniary penalty, establish a consumer protection law compliance program, and pay costs to the Australian Competition and Consumer Commission ('ACCC'). His Honour's reasons were explained in *ACCC v HJ Heinz Company Australia Limited*<sup>2</sup> ('Liability Judgment') and *ACCC v HJ Heinz Company Australia Limited (No 2)*<sup>3</sup> ('Relief Judgment'), collectively 'Heinz'.

*Heinz* was an example of the ACCC seeking to capitalise on its 'momentum' following high profile successes against Coles,<sup>4</sup> Reckitt Benckiser,<sup>5</sup> Ford,<sup>6</sup> Telstra,<sup>7</sup> Yazaki,<sup>8</sup> and Apple.<sup>9</sup> However *Heinz* did not vindicate the ACCC's 'more bullish view' on penalties.<sup>10</sup> The judgment fell far short of the ACCC's claim of \$10 million. That

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\* Hons LLB candidate; BCom (Acc) candidate; DipLang candidate (Adel); Associate Editor, *Adelaide Law Review* (2019).

<sup>1</sup> *Competition and Consumer Act 2010* (Cth) sch 2 ('*Australian Consumer Law*').

<sup>2</sup> (2018) 363 ALR 136 ('*Heinz*').

<sup>3</sup> [2018] FCA 1286 ('*Heinz (No 2)*').

<sup>4</sup> *ACCC v Coles Supermarkets Australia Pty Ltd* (2015) 327 ALR 540.

<sup>5</sup> *ACCC v Reckitt Benckiser (Australia) Pty Ltd* (2016) 340 ALR 25 ('*Reckitt Benckiser*').

<sup>6</sup> *ACCC v Ford Motor Company of Australia Limited* [2018] FCA 703.

<sup>7</sup> *ACCC v Telstra Corporation Limited* [2018] FCA 571.

<sup>8</sup> *ACCC v Yazaki Corporation* (2018) 357 ALR 55.

<sup>9</sup> *ACCC v Apple Pty Ltd [No 4]* [2018] FCA 953.

<sup>10</sup> James Keeves, 'Australian Competition and Consumer Commission v Reckitt Benckiser (Australia) Pty Ltd (2016) 340 ALR 25' (2017) 38(1) *Adelaide Law Review* 503, 511. See also *Reckitt Benckiser* (n 5) 66 [165], 69 [178]–[179]; Esther Han, 'Heinz to Pay \$2.25 Million Fine for "Deceptive" Peddling of Toddler Snack', *The Sydney Morning Herald* (online, 25 August 2018) <<https://www.smh.com.au/business/consumer-affairs/heinz-to-pay-2-25-million-fine-for-deceptive-peddling-of-toddler-snack-20180825-p4zzon.html>>.

vindication may now be realised thanks to amendments to the *Australian Consumer Law* that have significantly increased the maximum pecuniary penalties.<sup>11</sup>

This case note analyses the Court's reasoning in *Heinz* and considers its approach to identifying representations, the deterrence aspect of the penalty, the utility of the 'course of conduct' principle and problems with the quantification of penalties generally.

## II BACKGROUND

### A Facts

*Heinz* concerned the packaging of three 'Heinz Little Kids' food products aimed at children aged one to three years.<sup>12</sup> Named 'SHREDZ', the products came in 'berries apple & veg', 'peach apple & veg' or 'strawberry & apple with chia seeds' flavours (collectively, 'Products').<sup>13</sup>

The Products were all sold in boxes featuring a tree with a rope ladder and a smiling boy.<sup>14</sup> There were pictures of fruit, vegetables or seeds, corresponding to the ingredients. The boxes declared that the Products were '99% fruit and veg' without preservatives, artificial colours or flavours. The 'berries apple & veg' and 'peach apple & veg' boxes used the term 'nutritious' several times. The 'strawberry & apple with chia seeds' box stated 'Just the Good Stuff' and 'No Nasties'. However the back of each box displayed nutritional information showing the Products were approximately two-thirds sugar.<sup>15</sup> Figure 1 shows an unfolded copy of the packaging.

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<sup>11</sup> *Treasury Laws Amendment (2018 Measures No 3) Act 2018* (Cth) sch 1. But some commentators doubt that Australian courts will ever impose maximum penalties: see Caron Beaton-Wells and Julie Clarke, 'Deterrent Penalties for Corporate Colluders: Lifting the Bar' (2018) 37(1) *University of Queensland Law Journal* 107, 107.

<sup>12</sup> *Heinz* (n 2) 138 [1].

<sup>13</sup> *Ibid* 138 [4].

<sup>14</sup> See *ibid* 139–42 [7]–[22] for a description of the boxes.

<sup>15</sup> The berries apple & veg flavor contained an average of 68.7g of sugars per 100g.



**Figure 1: Heinz Little Kids SHREDZ Berries Apple & Veg<sup>16</sup>**

Source: *Heinz*

On 20 June 2016, the ACCC commenced proceedings against Heinz. On 19 March 2018, White J handed down the Liability Judgment. Heinz filed a notice of appeal. On 24 August 2018, the Relief Judgment followed. Notably, Heinz then discontinued its appeal.

### B Issues

First, the Court considered whether statements and images on the Products’ packaging conveyed representations to the effect that each Product

- (a) is of an equivalent nutritional value to the natural fruit and vegetables depicted on the packaging (the Nutritional Value Representation);
- (b) is a nutritious food and is beneficial to the health of children aged 1–3 years (the Healthy Food Representation); and/or
- (c) encourages the development of healthy eating habits for children aged 1–3 years (the Healthy Habits Representation).<sup>17</sup>

<sup>16</sup> Ibid 187.

<sup>17</sup> Ibid 142 [23].

If conveyed, the Court then had to consider whether the representations contravened the *Australian Consumer Law* ss 18 (misleading or deceptive conduct), 29(1)(a) and (g) (false or misleading representations) or 33 (conduct liable to mislead the public).

Justice White put aside questions such as whether purchasing the Products would be a sensible decision.<sup>18</sup> This shows that litigation about false, misleading or deceptive packaging does not stray into normative questions about the desirability of having the item on our shelves.

### III DECISION

#### A Representations

##### 1 Nutritional Value Representation

Justice White held that the Nutritional Value Representation was not conveyed. One hurdle was that the Nutritional Value Representation was never *expressly* stated. Heinz seized upon this, but White J focussed on the general effect of the statements and images. His Honour accepted that implied representations are possible.<sup>19</sup> However, crucially, consumers understand processed foods may not be nutritionally equivalent to their raw ingredients or ingredients depicted on their packaging.<sup>20</sup> Without a representation, there also could be no contravention of the *Australian Consumer Law*.

##### 2 Healthy Habits Representation

The Healthy Habits Representation was also rejected.<sup>21</sup> The ACCC relied heavily on the statement: ‘we aim to inspire a love of nutritious food that lasts a life time’.<sup>22</sup> Significantly, this contained no reference to eating habits.<sup>23</sup> The ordinary and reasonable consumer would understand it to be ‘aspirational’ only.<sup>24</sup> Again, if there was no representation, there could be no *Australian Consumer Law* contravention either.

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<sup>18</sup> Ibid 143 [28]–[29].

<sup>19</sup> Ibid 147 [58].

<sup>20</sup> Ibid 149 [65]–[67].

<sup>21</sup> Ibid 178 [254].

<sup>22</sup> Ibid 177 [247].

<sup>23</sup> Ibid 177 [249].

<sup>24</sup> Ibid 177 [250].

### 3 *Healthy Food Representation*

This representation was accepted. It contained two limbs:

- that the Products were nutritious; and
- that the Products were beneficial to the health of children.<sup>25</sup>

Heinz had several arguments for why these representations were not made. It contended that ordinary and reasonable consumers would read both the front and back of the box. However, White J considered that consumers were unlikely to read the detailed information ‘in the press of a supermarket aisle’.<sup>26</sup> Heinz also submitted that the packaging focussed on statements about the natural ingredients (not the word ‘nutritious’), and that consumers would understand the Products to be merely a snack (not a meal).<sup>27</sup> However, White J considered that consumers would likely absorb only ‘the general thrust’ of the packaging.<sup>28</sup> His Honour rejected the snack distinction as ‘artificial’.<sup>29</sup>

Having rejected Heinz’s contentions, White J analysed the imagery on the boxes (healthy young boy climbing a tree with wholesome fruit and vegetables), the colours used and the wording (‘99% fruit and veg’, ‘snacks and meals’ and ‘nutritious’).<sup>30</sup> Additionally, Heinz’s marketing reports confirmed an intention to convey that the Products were nutritious and healthy.<sup>31</sup> Justice White therefore had ‘no difficulty’ in finding that both limbs of the Healthy Food Representation were conveyed.<sup>32</sup>

## B *Contravention of the Australian Consumer Law*

### 1 *Section 18*

Justice White then considered whether either limb of the Healthy Food Representation contravened the *Australian Consumer Law* s 18(1), which prohibits conduct in trade or commerce that is ‘misleading or deceptive or is likely to mislead or deceive’. It would suffice for both ss 18 and 29 — despite their different wording<sup>33</sup> — that

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<sup>25</sup> Ibid 150 [74].

<sup>26</sup> Ibid 151 [81].

<sup>27</sup> Ibid 151 [82]–[83].

<sup>28</sup> Ibid 153 [89].

<sup>29</sup> Ibid 152 [86].

<sup>30</sup> Ibid 155–6 [99]–[100]. However for the ‘strawberry & apple with chia seeds’ product, the use of ‘Just The Good Stuff’, ‘No Nasties’ and the emphasis on fruit ingredients were the essential factors: at 180 [267]–[270].

<sup>31</sup> Ibid 154–5 [93]–[98].

<sup>32</sup> Ibid 155 [100].

<sup>33</sup> *Australian Consumer Law* s 29(1) prohibits various ‘false or misleading’ representations.

either limb of the Healthy Food Representation was false (meaning contrary to the relevant fact), or misleading (having a tendency to lead the ordinary and reasonable consumer into error).<sup>34</sup> This inquiry ‘is one of fact to be determined by an objective consideration in the light of all the relevant surrounding circumstances’.<sup>35</sup>

His Honour held that it was not false or misleading to represent that the Products were nutritious.<sup>36</sup> This rested on a narrow view of what ‘nutritious’ means. His Honour held that ordinary and reasonable consumers would understand ‘nutritious’ as referring to ‘the extent to which [a food] provides the nutrients which sustain life’.<sup>37</sup> Expert evidence indicated that the Products *did* contain nutrients such as vitamins A and C, that they were each a source of energy, and that the ‘strawberry & apple with chia seeds’ flavour was a source of dietary fibre.<sup>38</sup> It was therefore not false to represent that the Products were nutritious.

Conversely, the representation that the Products were beneficial to the health of children was found to be false and therefore contravened s 18.<sup>39</sup> This was due to two related qualities: the Products’ high sugar content and their sticky texture.<sup>40</sup> Regarding the former, his Honour considered Heinz’s internal guidelines on sugar content — which the Products exceeded — and expert evidence which supported the view that the sugar level was too high for the Products to be healthy.<sup>41</sup> Regarding the latter, his Honour also accepted expert evidence that the stickiness of the Products made them likely to adhere to teeth, where the high sugar level and low pH of the Products would increase the risk of developing dental caries.<sup>42</sup> In reaching the ultimate conclusion that there was a contravention of s 18, it was enough that the Products were not beneficial.<sup>43</sup>

<sup>34</sup> Ibid 144 [37], [39]. See also *ACCC v Dukemaster Pty Ltd* [2009] FCA 682, [14] (‘*Dukemaster*’); *ACCC v Coles Supermarkets Australia Pty Ltd* (2015) 317 ALR 73, 81 [40]. In *Dukemaster*, Gordon J considered the difference in wording between the predecessors to ss 18 and 29 (see *Trade Practices Act 1974* (Cth) ss 52 and 53), stating that her Honour had not found ‘any authority which attributes a meaningful difference to this dichotomy’: at [14]. See further *Foxtel Management Pty Ltd v Australian Video Retailers Association Ltd* (2004) 214 ALR 554, 588 [94].

<sup>35</sup> *Heinz* (n 2) 144 [40], citing *Parkdale Custom Built Furniture Pty Ltd v Puxu Pty Ltd* (1982) 149 CLR 191, 198–9; *Butcher v Lachlan Elder Realty Pty Ltd* (2004) 218 CLR 592, 625 [109].

<sup>36</sup> Ibid 163 [146], 179 [262], 180 [270].

<sup>37</sup> Ibid 162 [140].

<sup>38</sup> Ibid 162–3 [143]–[146].

<sup>39</sup> Ibid 177 [245], 179 [262], 180 [270].

<sup>40</sup> Ibid 172 [215], 177 [244].

<sup>41</sup> Ibid 165 [161]–[162], 167 [175], 175 [236].

<sup>42</sup> Ibid 172–3 [214]–[218], 175 [231].

<sup>43</sup> Ibid 175 [232].

## 2 Sections 29(1)(a), 29(1)(g) and 33

Justice White was ‘circumspect’ regarding other alleged contraventions, as the ACCC ‘did not address any submissions relating the evidence in this case to those elements [of ss 29 and 33]’.<sup>44</sup> In the absence of specific submissions, White J declined to find that ss 29(1)(a) or 33 were contravened.<sup>45</sup> However, the representation that the Products were beneficial to children amounted to a false or misleading representation that the Products had benefits, contravening s 29(1)(g) for the same reasons as s 18.<sup>46</sup>

### C Relief

Finally, an appropriate pecuniary penalty had to be assessed pursuant to s 224 for the contravention of s 29(1)(g). Contraventions of s 18 cannot attract pecuniary penalties.

Justice White held that Heinz’s conduct had the non-monetary effect of distorting consumer choice and had potentially adverse health effects for children.<sup>47</sup> A false or misleading representation was made *at least* every time the Products were purchased, amounting to 1.2 million contraventions.<sup>48</sup> The maximum penalty for each contravention was then \$1.1 million. There was also a contravention every time a consumer viewed the packaging, but that number was ‘indeterminate’.<sup>49</sup> Heinz’s size was emphasised, as larger companies require larger penalties to be deterred from unlawful conduct.<sup>50</sup>

Heinz’s state of mind was also ‘very relevant’ to the assessment of its culpability,<sup>51</sup> and therefore the penalty. His Honour held that ‘Heinz nutritionists ought to have known that a representation that a product containing approximately two-thirds sugar was beneficial to the health of children aged 1–3 years was misleading’.<sup>52</sup> However, Heinz was not viewed as having treated the possibility of sanctions as a mere ‘cost of doing business’,<sup>53</sup> nor as having an indifferent senior management.<sup>54</sup> Further, while the contraventions were ‘serious’, they were not ‘egregious’.<sup>55</sup>

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<sup>44</sup> Ibid 180–1 [271]–[273].

<sup>45</sup> Ibid 181 [274], [277].

<sup>46</sup> Ibid 181 [275].

<sup>47</sup> *Heinz (No 2)* (n 3) [18]–[20].

<sup>48</sup> Ibid [15], [17].

<sup>49</sup> Ibid [17].

<sup>50</sup> Ibid [39]–[43].

<sup>51</sup> Ibid [21], citing *Reckitt Benckiser* (n 5) 58 [131].

<sup>52</sup> *Heinz* (n 2) 186 [312].

<sup>53</sup> *Heinz (No 2)* (n 3) [54].

<sup>54</sup> Ibid [62].

<sup>55</sup> Ibid [36], [38].

Taking all of this into account, and considering Heinz's overall course of conduct, White J ordered that Heinz pay a pecuniary penalty of \$2.25 million. Further, his Honour ordered that Heinz establish a three-year consumer protection law compliance program and pay costs. His Honour declined to make a corrective publication order, given the time that had elapsed since sales of the Products had ceased and the publicity surrounding the litigation.<sup>56</sup>

## IV COMMENT

### A *Implied Representations*

*Heinz* shows that businesses may not escape censure through a careful choice of words and the use of fine print. Justice White's pragmatic approach focussed on the *implication* conveyed to the relevant class of ordinary and reasonable consumers.<sup>57</sup> The same approach could equally be applied to find implications regarding the qualities or risks of other types of products, such as financial products and services.<sup>58</sup> The possibility of such an application may now be higher given the increased scrutiny following the Royal Commission into Misconduct in the Banking, Superannuation and Financial Services Industry. However, the key question would be whether consumers of financial services are equally as 'unlikely'<sup>59</sup> to read the fine print as supermarket shoppers. Perhaps not traditionally. But with the rise of mobile-based online financial services,<sup>60</sup> and clickwrap contracts,<sup>61</sup> White J's approach may be increasingly applicable.

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<sup>56</sup> Ibid [84].

<sup>57</sup> *Heinz* (n 2) 147 [57]–[58]. For a similar approach to implications, see *ACCC v Nudie Foods Australia Pty Ltd* [2008] FCA 943; Sharn Hobill and Jay Sanderson, 'Not Free to Roam: Misleading Food Credence Claims, the ACCC and the Need for Corporate Social Responsibility' (2017) 43(1) *Monash University Law Review* 113, 126.

<sup>58</sup> *Australian Securities and Investments Commission Act 2001* (Cth) ss 12DA, 12DB, 12DF; *Corporations Act 2001* (Cth) ss 1041E, 1041F, 1041H.

<sup>59</sup> *Heinz* (n 2) 151 [81].

<sup>60</sup> Val Srinivas and Richa Wadhvani, 'The Value of Online Banking Channels in a Mobile-Centric World', *Deloitte Insights* (Blog Post, 13 December 2018) <<https://www2.deloitte.com/insights/us/en/industry/financial-services/online-banking-usage-in-mobile-centric-world.html>>.

<sup>61</sup> See Susan E Gindin, 'Nobody Reads Your Privacy Policy or Online Contract? Lessons Learned and Questions Raised by the FTC's Action Against Sears' (2009) 8(1) *Northwestern Journal of Technology and Intellectual Property* 1; Christopher McMahon, 'iPromise: How Contract Theory Can Inform Regulation of Online Consumer Contracts' (2018) 21 *Trinity College Law Review* 174.

### B *Does Intention Show That a Representation Was Made?*

Justice White also stated, in line with authority,<sup>62</sup> that a finding that a representation was made may be reached more readily when the Court can discern an intention on the part of the representor to make it.<sup>63</sup> As a matter of principle, this is difficult to reconcile with an analytical framework that otherwise focusses entirely on the effect of representations on the ordinary and reasonable consumer. Of course, insofar as the representor's intention is *manifested* in statements or images (as in the present case),<sup>64</sup> the intention is indirectly considered. However, it is not apparent what standalone references to intention *add* to this. At best, White J's approach may help to catch malicious advertisers whose motives were clear but whose execution lacked a smoking gun. Yet it equally invites the possibility of exonerating an advertiser whose conduct was the same but who lacked a Heinz-level trail of incriminating marketing reports.

### C *Deterrence: The Bigger They Are, the Harder They (Should) Fall*

Turning to the penalty, deterring unlawful conduct is undoubtedly '[t]he principal concern of the Court in fixing ... an appropriate pecuniary penalty'.<sup>65</sup> For a penalty to achieve specific deterrence, the size of the contravener's financial resources is 'clearly relevant'.<sup>66</sup> Justice White noted Heinz's \$448 million revenue and its parent company's US\$26.5 billion in annual global sales.<sup>67</sup>

Yet his Honour was circumspect regarding the need for specific deterrence of Heinz. Justice White considered that the continuation of Heinz's conduct after the ACCC commenced investigations did not indicate that Heinz viewed sanctions as a 'cost of doing business'.<sup>68</sup> Rather, Heinz's conduct was attributable to a 'failure to appreciate' that it was making a false or misleading representation.<sup>69</sup>

Heinz's conduct may well have been less culpable than, for example, Reckitt Benckiser's in the Nurofen litigation. In that case, Reckitt Benckiser repeatedly denied liability despite a string of public criticisms and complaints,<sup>70</sup> only for the company to admit liability at the last possible moment.<sup>71</sup> However, White J's approach

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<sup>62</sup> *ACCC v TPG Internet Pty Ltd* (2013) 250 CLR 640, 657 [55]–[56].

<sup>63</sup> *Heinz* (n 2) 154–5 [93]–[98].

<sup>64</sup> *Ibid* 155 [99].

<sup>65</sup> *Heinz (No 2)* (n 3) [45], citing *Commonwealth v Director, Fair Work Building Industry Inspectorate* (2015) 258 CLR 482, 506 [55]. See also *Reckitt Benckiser* (n 5) 62 [148]; *Hobill and Sanderson* (n 57) 129.

<sup>66</sup> *ACCC v Coles Supermarkets Australia Pty Ltd* (2015) 327 ALR 540, 560 [92].

<sup>67</sup> *Heinz (No 2)* (n 3) [42]–[43].

<sup>68</sup> *Ibid* [50].

<sup>69</sup> *Ibid* [54].

<sup>70</sup> *Reckitt Benckiser* (n 5) 59 [136], 61 [144].

<sup>71</sup> *Ibid* 65 [160], 68–9 [177].

is arguably at odds with both a judicial<sup>72</sup> and legislative<sup>73</sup> trend towards *higher* penalties. This trend culminated in the recent maximum penalty increase, which took effect a week after the Relief Judgment was handed down.<sup>74</sup> The maximum penalty for a body corporate (previously \$1.1 million) is now the greater of

- (a) \$10,000,000;
- (b) if the court can determine the value of the benefit that the body corporate, and any body corporate related to the body corporate, have obtained directly or indirectly and that is reasonably attributable to the act or omission — 3 times the value of that benefit;
- (c) if the court cannot determine the value of that benefit — 10% of the annual turnover of the body corporate during the 12-month period ending at the end of the month in which the act or omission occurred or started to occur.<sup>75</sup>

In this context, Heinz's \$2.25 million penalty goes against the grain. Whereas White J's approach accepts that financial resources are relevant but takes a careful approach to deterrence, the approach in the *Treasury Laws Amendment (2018 Measures No 3) Act 2018* (Cth) makes financial resources potentially decisive and focuses strongly on deterrence. Further, whereas the Court saw limited moral culpability in Heinz's 'failure to appreciate', the size of the possible penalties now creates an imperative for companies to proactively appreciate consumer law issues. That is precisely the goal endorsed by the Assistant Minister to the Treasurer in his second reading speech:

[P]enalties must be sufficiently high that a business, acting rationally and in its own interests, would not be prepared to treat the risk of such a penalty as simply a cost of doing business.<sup>76</sup>

That statement echoes the aim set out a year earlier in *Reckitt Benckiser*: making 'the deterrence sufficiently effective in achieving *voluntary compliance*'.<sup>77</sup> Thus, even though *Heinz* preceded the legislative changes, White J could have gone further in

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<sup>72</sup> Ibid 69 [178]–[179]; *ACCC v Coles Supermarkets Australia Pty Ltd* [2014] FCA 1405, [106].

<sup>73</sup> Explanatory Memorandum, *Treasury Laws Amendment (2018 Measures No 3) Bill 2018* (Cth) 7–8. See also Keeves (n 10) 512, citing David Benson and Sam Fiddian, 'The ACCC's 2017 Compliance and Enforcement Priorities for Consumers and Small Businesses' (2017) 21 *Inhouse Counsel* 55.

<sup>74</sup> *Treasury Laws Amendment (2018 Measures No 3) Act 2018* (Cth). Schedule 1, which contains the relevant amendments, commenced on 1 September 2018: at s 2.

<sup>75</sup> Ibid sch 1 s 49.

<sup>76</sup> Commonwealth, *Parliamentary Debates*, House of Representatives, 15 February 2018, 1619 (Michael Sukkar, Assistant Minister to the Treasurer).

<sup>77</sup> *Reckitt Benckiser* (n 5) 62 [151] (emphasis added).

pursuing the underlying objective of deterrence. Indeed, so much might be gleaned from Heinz's decision to discontinue its appeal following the Relief Judgment.

#### D *The 'Course of Conduct' Principle and Quantifying Penalties*

Finally, the 'course of conduct' principle warrants consideration. This discretionary tool permitted White J to group numerous contraventions into a 'course of conduct' and impose a single overall penalty for it, without that sum being capped by the statutory maximum.<sup>78</sup>

The first issue is whether this is permitted by s 224 of the *Australian Consumer Law*. Justice White noted that statutory limits on the penalty for each act or omission seem '[p]rima facie ... inconsistent with the Court being permitted to impose a penalty of a single sum "in respect of" multiple contraventions'.<sup>79</sup> However, his Honour sidestepped the problem and applied the course of conduct principle by holding that s 224 'may not preclude' the imposition of a single pecuniary penalty which reflects the aggregate of individual penalties comprising a course of conduct.<sup>80</sup> His Honour did not propose a broader solution to this problem — indeed, 'none of the authorities have articulated a rationale' for applying the course of conduct principle to s 224.<sup>81</sup> This state of play is unsatisfactory. It could be easily clarified by statute, as in the *Fair Work Act 2009* (Cth) s 557.<sup>82</sup>

Adding further mystery to the penalty calculation, his Honour considered that it was 'not necessary for me to identify the individual penalties used to derive that aggregate figure',<sup>83</sup> an approach which neither party disputed. His Honour also considered that it was immaterial to determine the precise number of courses of conduct (as the result would be similar regardless).<sup>84</sup> It apparently followed that the appropriate penalty was \$2.25 million. This approach is an example of 'instinctive synthesis'<sup>85</sup> — a term that leads to more questions than answers.

Not quantifying the courses of conduct or individual penalties for each act is at least pragmatic. It was the approach of the Full Court in *Reckitt Benckiser*,<sup>86</sup> has High

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<sup>78</sup> *Heinz (No 2)* (n 3) [63]. See also *ACCC v Yazaki Corporation* (2018) 357 ALR 55.

<sup>79</sup> *Heinz (No 2)* (n 3) [70].

<sup>80</sup> *Ibid* [71].

<sup>81</sup> *Ibid* [69].

<sup>82</sup> See *Fair Work Ombudsman v Zucco Farming Pty Ltd* [2019] FCCA 1277, [26]–[28] for a recent application of this provision. See also *Spam Act 2003* (Cth) s 25(3)(b).

<sup>83</sup> *Heinz (No 2)* (n 3) [77].

<sup>84</sup> *Ibid* [73]–[74].

<sup>85</sup> *ACCC v Coles Supermarkets Australia Pty Ltd* (2015) 327 ALR 540, 543 [6]; OECD, *Pecuniary Penalties for Competition Law Infringements in Australia* (Report, 2018) 7.

<sup>86</sup> *Reckitt Benckiser* (n 5) 38 [44], 65–6 [164]–[165].

Court support,<sup>87</sup> and has been applied since.<sup>88</sup> It may be that greater precision is elusive for large-scale representations to consumers,<sup>89</sup> especially if the effects are non-monetary like in *Heinz*.

Nonetheless, greater certainty for litigants including the ACCC would be achieved if we could know the secret recipe. Compared to other jurisdictions, Beaton-Wells and Clarke have called the Australian approach ‘unstructured and non-sequential, as well as non-transparent and highly discretionary’.<sup>90</sup> *Heinz* is a case in point. The discretion results in outcomes that are both hard to justify and hard to appeal.<sup>91</sup> Perhaps the course of conduct principle is less a useful tool and more new clothes for the Emperor.

Now that the maximum penalties have increased significantly, it is even more important that a clear analytical approach be introduced for s 224 and its analogues.<sup>92</sup> The new maximums will shift the goal posts towards higher penalties in general, as maximum penalties are relevant when considering what is appropriate in any particular case.<sup>93</sup> The increase will likely go some way to achieving Handsley and Reeve’s recommendation of ‘meaningful sanctions for non-compliance’.<sup>94</sup> But by shunning a structured method for calculating penalties, the courts have given themselves a multi-million-dollar judicial discretion. As the stakes rise, will we see more appeals purely in the hope that the next roll of the dice is more favourable?

## V CONCLUSION

The ACCC’s success in *Heinz* was tempered by the fact that the ACCC proved contraventions of only two of four relevant *Australian Consumer Law* provisions for one of three alleged representations. While *Heinz* was a timely reminder that companies are responsible for both express and implied representations, the penalty was also smaller than other recent ACCC successes. However, with greater maximum penalties now

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<sup>87</sup> *Markarian v The Queen* (2005) 228 CLR 357, 375 [38]–[39].

<sup>88</sup> *Veeraragoo v Goldbreak Holdings Pty Ltd (No 2)* [2018] FCA 1448, [62].

<sup>89</sup> See, eg, *ACCC v Coles Supermarkets Australia Pty Ltd* (2015) 327 ALR 540, 546 [18].

<sup>90</sup> Beaton-Wells and Clarke (n 11) 125.

<sup>91</sup> *Reckitt Benckiser* (n 5) 37–8 [44].

<sup>92</sup> See, eg, *Competition and Consumer Act 2010* (Cth) s 76.

<sup>93</sup> *Markarian v The Queen* (2005) 228 CLR 357, 372 [30]–[31]. See also *Setka v Gregor (No 2)* (2011) 195 FCR 203, 211 [46]; *McDonald v Australian Building and Construction Commissioner* (2011) 202 IR 467, 474 [28]–[29].

<sup>94</sup> Elizabeth Handsley and Belinda Reeve, ‘Holding Food Companies Responsible for Unhealthy Food Marketing to Children: Can International Human Rights Instruments Provide a New Approach?’ (2018) 41(2) *University of New South Wales Law Journal* 449, 482.

in place, perhaps future courts will satisfy ACCC Chairman Rod Sims' hope that 'this sort of behaviour is effectively deterred'.<sup>95</sup>

*Heinz* is more pragmatic than principled. The case raises questions about the relevance of a representor's intention in determining whether a representation is conveyed, the importance of deterrence, the utility of the course of conduct principle and — most significantly — the pressing need for methodology in the dark art of quantifying pecuniary penalties.

On that final issue, the OECD's recent recommendation to study the possibility of adopting a structured approach to setting penalties is an excellent starting point.<sup>96</sup> The OECD's 2018 report summarises the approach in the European Union, Germany, Japan, Korea, the United Kingdom and the United States. Each jurisdiction calculates penalties through a more transparent process that involves determining a base penalty, adjusting it for aggravating and mitigating circumstances, then making final adjustments to achieve an end result that is adequate and deters non-compliance.<sup>97</sup> Those jurisdictions already light the path to reform. Without further legislative changes to bring Australia into line, we will continue to lack a transparent and predictable mechanism for determining pecuniary penalties. How fitting, then, that a case about food should provide so much food for thought.

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<sup>95</sup> Rebecca Opie, 'Heinz to Pay \$2.25m for "Misleading and Deceptive" Marketing of Sugar-Heavy Food', *ABC News* (online, 24 August 2018) <[https://www.abc.net.au/news/2018-08-24/heinz-fined-\\$2.25-million-for-misleading-public/10162404](https://www.abc.net.au/news/2018-08-24/heinz-fined-$2.25-million-for-misleading-public/10162404)>.

<sup>96</sup> OECD (n 85) 73–4.

<sup>97</sup> *Ibid* 38–54.



## UNCLAIMED PERSONAL PROPERTY AND THE STATE'S LIABILITY FOR ACCRUED INTEREST: A COMPARATIVE LESSON FROM THE UNITED STATES

### I INTRODUCTION

The law of property concerns itself with a group of related questions: what property is and when it can be said to exist, and how it is deployed by a legal system to allocate goods and resources. A vast system of rules surrounds those matters in every jurisdiction the world over. Those that have their origins in the common law typically have a modern legal structure made up of both common law and legislative principles.<sup>1</sup> Part of those rules concern what happens when the holder of property dies without making provision for who it should be left to. In most jurisdictions, the law relating to the distribution of an estate on intestacy is a complicated hybrid of the common law principles of inheritance and — in the absence of heirs — escheat for real property and *bona vacantia* for personal property, with statutory reforms and interventions in varying degrees encroaching upon the common law doctrines. In the United States, for instance, property — both real and personal — that becomes unowned through the death of the owner without a valid will or qualified heirs is generally said to escheat to the state. In Australia, various legislative reforms operate in respect of different sorts of property. Thus, in all Australian jurisdictions, legislation replaces or supplements the common law with a hierarchy of rules for the distribution of an estate on intestacy. In most cases of failure of heirs, such property is treated as a statutory form of *bona vacantia*.<sup>2</sup>

A distinct, though related, issue arises in the case of property which the holder has forgotten about or has left unused for a substantial period of time. In the case of real

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\* JD (Harv); PhD (Harv); William Rand Kenan, Jr Professor of Law, University of North Carolina. The author gratefully acknowledges the assistance of Professor Paul Babie in respect of the Australian authorities.

<sup>1</sup> While this article does not attempt to cover all such regimes that might exist in respect of any form of property, there are some areas where the law is now entirely legislative, such as in respect of security interests in personal property. Many jurisdictions, Australia included, now have legislative regimes to deal with such interests: see *Personal Property Securities Act 2009* (Cth). See also Anthony Duggan and David Brown, *Australian Personal Property Securities Law* (LexisNexis, 2<sup>nd</sup> ed, 2015).

<sup>2</sup> See Victorian Law Reform Commission, 'Bona Vacantia' (Web Page, 23 January 2013) <<https://www.lawreform.vic.gov.au/content/bona-vacantia>>. For a statement of the common law concerning *bona vacantia*, see Sir William Blackstone, *Commentaries on the Laws of England, Book I, Of the Rights of Persons* (Oxford University Press, 2016) 288.

property, a system of rules relating to adverse possession operates in most common law jurisdictions.<sup>3</sup> In the case of tangible personal property with no apparent owner, some jurisdictions continue to use the concept of *bona vacantia*. Other jurisdictions use a legislative hybrid of that doctrine, as in Australia. And still others treat it as lost or mislaid property, as in the United States, with the present right to possession assigned to the finder or owner of the locus in quo respectively, to hold on behalf of the 'true owner'. Abandoned personalty is generally open to the claim of the first possessor.<sup>4</sup>

Within the category of lost, mislaid, or abandoned property, intangible personal property that is presently unclaimed typically poses special problems. In a modern capitalist society, vast amounts of wealth are held in the form of *choses in action*; that is, proprietary rights created by contract, such as deposit accounts in banks, ownership interests in corporations, and debts represented by uncashed cheques. Left unclaimed by their owners, these rights are removed from the stream of commerce and are at risk of being appropriated by the depositaries, corporations, and obligors. To make the property productive and to protect it from misappropriation, unclaimed property legislation in both the United States and Australia operate to allow the state to administer it.<sup>5</sup>

Although these acts in the United States often refer to the property as 'presumed abandoned', they also make clear that the state does not claim title, either as *bona vacantia* or by adverse possession, but rather takes custody for the benefit of the owner. In Australia, Commonwealth, state and territory legislation make similar provision.<sup>6</sup> All provide for delivery of the property to the owner on demand and appropriate proof of ownership. Divergence between jurisdictions arises, however,

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<sup>3</sup> See Paul Babie, 'The Crown and Possessory Title of Torrens Land in South Australia' (2016) 6(1) *Property Law Review* 46; Paul Babie and John Orth, 'The Troubled Borderlands of Torrens Indefeasibility: Lessons from Australia and the United States' (2017) 7(1) *Property Law Review* 33.

<sup>4</sup> See John V Orth, 'What's Wrong With the Law of Finders and How to Fix It' (2001) 4(7) *Green Bag 2d* 391 (describing and criticising the distinction between lost, mislaid, and abandoned property).

<sup>5</sup> In the United States, many statutes are derived from one iteration or another of the *Uniform Unclaimed Property Act*: see National Conference of Commissioners on Uniform State Laws, *Estate, Probate and Related Laws* (Thomson Reuters, 2016) vol 8C. In Australia, this is achieved through the *Banking Act 1959* (Cth) and the *Life Insurance Act 1995* (Cth). Specifically, s 69(7AA) of the *Banking Act 1959* (Cth) provides: 'If unclaimed moneys are paid to an ADI [‘Authorised Deposit Taking Institution’] under subsection (7) on or after 1 July 2013: (a) the Commonwealth must also pay to the ADI the amount of interest (if any) worked out in accordance with the regulations; and (b) the ADI must pay that amount to the person.'

<sup>6</sup> See 'Unclaimed Money', *Australian Securities and Investments Commission* (Web Page, 16 April 2019) <<https://asic.gov.au/for-consumers/unclaimed-money/>>; 'Money Held by State Governments', *Australian Securities and Investments Commission* (Web Page, 6 March 2019) <<https://www.moneysmart.gov.au/tools-and-resources/find-unclaimed-money/money-held-by-state-governments>>.

in relation to the payment of interest on such property while in the state's custody. A recent lawsuit challenged the refusal by the State of Minnesota to account for interest on unclaimed personal property in the State's custody.<sup>7</sup> The decision of the Supreme Court of Minnesota provides an overview of the reasons for considering the justice of interest payments on unclaimed property.<sup>8</sup>

## II FACTUAL BACKGROUND

Plaintiff Timothy Hall alleged that the State of Minnesota had taken custody of an uncashed cheque for less than \$100 payable to him. A second plaintiff, Beverly Herron, alleged that the State was holding insurance proceeds of \$236.67 belonging to her.<sup>9</sup> Finally, plaintiff Mary Wingfield alleged that the State had custody of over \$100,000 taken from her interest-bearing bank account.<sup>10</sup> The State did not deny the plaintiffs' ownership, but offered to deliver to them only the value of the property at the time the State took possession.<sup>11</sup> The plaintiffs claimed that failure to account

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<sup>7</sup> *Hall v Minnesota*, 908 NW 2d 345 (Minn, 2018) ('*Hall*'). The plaintiffs also claimed individually and on behalf of a class of all owners of property that had been remitted to the State that the notice of the transfer of possession to the State was inadequate and violated the requirements of due process, but the Court rejected this claim.

<sup>8</sup> This is of concern in Australia too, in respect of the *Australian Constitution's* provision for just terms compensation for Commonwealth acquisition of property in s 51(xxxi). While s 51(xxxi) does not provide the wide scope of protection found in the Fifth Amendment to the *United States Constitution*, the two protections are not dissimilar. Still, the question as to whether interest is required in order to meet the just terms requirement remains open: see, *Commonwealth v Tasmania* (1983) 158 CLR 1, 291 (Deane J); *Commonwealth v Western Australia* (1999) 196 CLR 392, 462 (Kirby J), 490 (Callinan J). Cf *Grace Brothers Pty Ltd v Commonwealth* (1946) 72 CLR 269, 282 (Latham CJ), 286 (Starke J), 293 (Dixon J), 296 (McTiernan J). See also Australian Law Reform Commission, *Traditional Rights and Freedoms: Encroachments by Commonwealth Laws* (Report No 129, December 2015) 19 ('*Traditional Rights and Freedoms*'). On the comparative operation of the Fifth Amendment and s 51(xxxi): see Krithika Ashok, Paul T Babie and John V Orth, 'Balancing Justice Needs and Private Property in Constitutional Takings Provisions: A Comparative Assessment of India, Australia, and the United States' (2019) 42(4) *Fordham International Law Journal* 999.

<sup>9</sup> A third plaintiff, Michael Undlin, alleged that the State was holding 'property payable to him worth over \$100', apparently insurance proceeds: *Hall* (n 7) 349, 354.

<sup>10</sup> There is no indication in the Court's opinion of the rate of interest on the account.

<sup>11</sup> Under the *Minnesota Unclaimed Property Act*, Minn Stat §§ 345.31–60, the State is not obligated to pay to the owner any 'income or other increments accruing' on the property after the holder transfers the property to the Commissioner of Commerce: Minn Stat § 345.45, as repealed by Act of 2019 First Special Session, ch 7, art 10 § 15(a) Minn Laws 1.

for interest during the time in possession was an unconstitutional acquisition of their property.<sup>12</sup>

Although the Court described the issue as being whether the plaintiffs had ‘a protected property right in the interest accrued on their property during the time that the State held it’,<sup>13</sup> there was no allegation that the property actually ‘earned interest after it was transferred to the State’.<sup>14</sup> In defence of its refusal to account for interest, either actual or constructive, the State principally relied on a decision of the United States Supreme Court, *Texaco Inc v Short*,<sup>15</sup> which upheld the constitutionality of Indiana’s *Mineral Lapse Act*. That statute provided that a severed mineral interest that remains unused for 20 years ‘automatically lapses and reverts to the current surface owner’, unless the mineral owner filed a timely statement of claim in the registry of deeds. The Supreme Court held in that case that there is no constitutional right to compensation ‘for the consequences of [an owner’s] own neglect’.<sup>16</sup> Eight state courts and two federal circuit courts have subsequently held that the rationale of *Texaco* justifies the state’s refusal to account for interest on unclaimed property in its custody.<sup>17</sup>

### III DECISION OF THE MINNESOTA SUPREME COURT

The Supreme Court of Minnesota agreed with the approach in *Texaco* — as to the plaintiffs’ property that was not earning interest at the time it passed into the State’s custody — but disagreed as to the plaintiffs’ property that was interest-bearing when taken by the State. The Court held that the third plaintiff had suffered ‘an actual loss of interest that she reasonably expected her principal to earn’.<sup>18</sup>

A similar result was reached in a case decided by the US Court of Appeals for the Seventh Circuit.<sup>19</sup> In an opinion authored by Judge Richard Posner, long a leader in

<sup>12</sup> *United States Constitution* amend V (‘No person shall be ... deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use without just compensation.’), applied to the states through amend XIV. The *Minnesota Constitution* has a similar provision: *Minnesota Constitution* art I § 13.

<sup>13</sup> *Hall* (n 7) 352.

<sup>14</sup> *Ibid* 354.

<sup>15</sup> 454 US 516 (1982) (‘*Texaco*’).

<sup>16</sup> *Ibid* 530. Under Indiana’s *Mineral Lapse Act* Ind Code § 32-23-10 (2015), unlike the *Unclaimed Property Acts*, the property interest is ‘deemed as a matter of law to be abandoned’: *ibid* 529.

<sup>17</sup> *Hall* (n 7) 353 (listing citations). See John V Orth, ‘Interest Follows Principal: Why North Carolina Should Pay Interest on Unclaimed Personal Property’ (2015) 37 *Campbell Law Review* 321 (criticising one of these decisions).

<sup>18</sup> *Hall* (n 7) 356.

<sup>19</sup> *Cerajeski v Zoeller*, 735 F 3d 577 (7<sup>th</sup> Cir, 2013) (‘*Cerajeski*’).

the field of Law and Economics,<sup>20</sup> the Court held that Indiana's 'confiscation of the interest' earned on a depositor's inactive account which was taken by the State is 'a taking of a part of his property';<sup>21</sup> '[I]f you own a deposit account that pays interest, you own the interest.'<sup>22</sup> Not discussed in Judge Posner's decision was whether the State would be liable for interest on personal property that was not interest-bearing at the time it was taken into the State's custody.<sup>23</sup>

The Supreme Court of Minnesota in *Hall* began its reasoning by analysing 'the nature of the property at issue'.<sup>24</sup> The depositor who owned an interest-bearing account had a 'constitutionally protected property right'<sup>25</sup> to continue to receive interest, while the payees of the uncashed cheques had no property right beyond the face value of the cheques. The distinction drawn seems to be between a benefit that was already in the process of being realised (property) and the opportunity to gain a benefit (not property). Those who lost the latter had to suffer 'the consequences of [their] own neglect'.<sup>26</sup>

The Court treated it as immaterial whether the State had earned interest on the property or not. The measure of damages was what the owners of the property had lost, not what the State gained.<sup>27</sup> No inquiry was made into the nature of the neglect that led to the loss of the payees' opportunity to earn interest, whether they had negligently left the cheques uncashed or had never received them and then negligently failed to enforce their right to payment.<sup>28</sup>

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<sup>20</sup> See Stephen B Presser, *Law Professors: Three Centuries of Shaping American Law* (West Academic Publishing, 2017) 297–313 (describing Judge Posner as the exemplar of the 'economic approach to law').

<sup>21</sup> *Cerajeski* (n 19) 580.

<sup>22</sup> *Ibid.* Judge Posner admitted that '[t]he state can charge a fee for custodianship and for searching for the owner, but the interest on the principal in a bank account is not a fee for those services': at 583.

<sup>23</sup> Within days of the decision in *Hall* (n 7), the United States District Court for the Northern District of Illinois construed the holding in *Cerajeski* (n 19) as limited to unclaimed property taken from an interest-bearing account: *Kolton v Frerichs* (ND Ill, Civ No 16-3792, 28 March 2018).

<sup>24</sup> *Hall* (n 7) 354.

<sup>25</sup> *Ibid* 349.

<sup>26</sup> *Ibid* 353, quoting *Texaco* (n 15) 530.

<sup>27</sup> *Hall* (n 7) 355 citing *Brown v Legal Foundation of Washington*, 538 US 216, 235–6 (2003). There is no discussion in *Hall* (n 7) of the rate of interest for which the state is liable.

<sup>28</sup> In *Cerajeski* (n 19), Judge Posner noted that the depositor in that case was sufficiently incapacitated to require the appointment of a guardian and that the guardian was 'unaware of the account until years after it was transferred to the state': at 581.

## IV CONCLUSION

While the reasoning of the Minnesota Supreme Court to some extent turned on the protection of property pursuant to the Due Process Clause of the *United States Constitution*,<sup>29</sup> that is not altogether unhelpful in the Australian context. Indeed, the question as to whether interest should be taken into account in order to meet the requirement of 'just terms' compensation in s 51(xxxi) of the *Australian Constitution* remains unsettled, although previous judgments considering the issue seem to suggest that it should.<sup>30</sup> As such, the Minnesota Supreme Court's reasoning proves helpful for two reasons: what it might tell us about the future application of s 51(xxxi) to interest payments, and the not unrelated question of why it is that a jurisdiction ought to consider whether justice might require the payment of interest in such cases. This latter point remains important, too, for in Australia, while interest is payable on the unclaimed balance in bank accounts without regard to whether it had previously been earning interest, in some states the same is not true in respect of property in intestate estates.<sup>31</sup> The reasoning of the Supreme Court of Minnesota will therefore be of value in those jurisdictions considering reforms to the legislative schemes implemented for dealing with unclaimed property.<sup>32</sup>

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<sup>29</sup> *United States Constitution* amend XIV.

<sup>30</sup> *Commonwealth v Tasmania* (1983) 158 CLR 1, 291 (Deane J); *Commonwealth v Western Australia* (1999) 196 CLR 392, 462 (Kirby J), 490 (Callinan J). Cf *Grace Brothers Pty Ltd v Commonwealth* (1946) 72 CLR 269, 282 (Latham CJ), 286 (Starke J), 293 (Dixon J), 296 (McTiernan J).

<sup>31</sup> See, eg, South Australian Law Reform Institute, *Report 7: South Australian Rules of Intestacy* (Report, 2017). See also *Traditional Rights and Freedoms* (n 8) 19.

<sup>32</sup> See, *Report 7: South Australian Rules of Intestacy* (n 31); *Traditional Rights and Freedoms* (n 8) 19.

*Dale Stephens\**

***REDEFINING THE MODERN MILITARY:  
THE INTERSECTION OF PROFESSION AND ETHICS***

**EDITED BY NATHAN K FINNEY AND TYRELL O MAYFIELD**

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**M**ilitary forces occupy a unique position in contemporary society. Governed by strict codes of discipline that are not applicable to their civilian populations, being authorised to use extensive lethal force in times of armed conflict, and being required to sacrifice their lives in the name of the nation, all set the military apart. In view of these circumstances, it is fair to ask whether the military is itself a profession, and if so what, if any, ethical principles ground its decision-making, especially in times of armed conflict where lives are taken and sacrificed.

These questions are asked and answered in *Redefining the Modern Military: The Intersection of Profession and Ethics*, edited by Nathan Finney and Tyrell Mayfield, published in 2018 by the Naval Institute Press. Fundamental questions about the nature of military service and its professionalism are raised through the 12 substantive chapters of the book. Issues covered include the nature of professionalism itself, the intersection of law and ethics, the moral and ethical boundaries of military service, the individual obligations of professional conduct, the historical evolution of United States Naval professionalism, the role of military education, the nature of military identity, the relevance of individual ethical orientation, the involvement of other professions on the battlefield and the professionalism of the air force.

This book is timely in its treatment of the topic of professionalism. Foundational studies of the nature of modern military service and its cultural and social dimensions can be traced back to the works of Huntington,<sup>1</sup> Janowitz<sup>2</sup> and Hackett<sup>3</sup> dating from

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\* Professor, University of Adelaide Law School; Director, Research Unit on Military Law and Ethics, The University of Adelaide; BA (Flinders), LLB (Hons) (Adel), GDLP (SAIT), LLM (Melb), LLM, SJD (Harv).

<sup>1</sup> Samuel P Huntington, *The Soldier and the State: The Theory and Politics of Civil-Military Relations* (Belknap Press, 1957).

<sup>2</sup> Morris Janowitz, *The Professional Soldier: A Social and Political Portrait* (Free Press, 1960).

<sup>3</sup> General Sir John Hackett, *The Profession of Arms* (Times Publishing, 1963).

the late 1950s and early 1960s. As the editors of the book note, while these studies have essentially established the scholarly field and have continuing relevance in the identification of professional military culture, there have been decisive developments in professional military service since that time. New theatres of potential armed conflict beyond land, sea and air have arisen in the areas of outer space and cyberspace. Additionally, major wars in Vietnam, Afghanistan and Iraq, along with shorter engagements in theatres such as Granada, the Balkans and numerous peace-keeping and peace enforcement operations have all generated their own lessons for military forces and their cultures. Similarly, the rise of military technology, the prevailing reliance upon volunteer military forces, the greater role and capacity of non-state actors in armed conflict, the interconnectedness of global affairs and the capacity for constant observation and critique of military operations through public television and social media, have all brought their own lessons for military professionalism and ethics. Given these major developments, this book is a welcome and useful contribution to the understanding of military professionalism and the ethical framework that has been adopted by contemporary military forces when engaging in the myriad operational roles currently undertaken.

For the purposes of this review, the chapter by Wing Commander Jo Brick of the Royal Australian Air Force possesses particular resonance.<sup>4</sup> Brick tackles the critical relationship between law and ethics in the context of professional military behaviour. This relationship is generally underexplored in the literature and her treatment of it represents a moment of significant insight and clarity. It is self-evidently true that the legal regulation of armed conflict is voluminous, extensive and dense in its application. The 1949 *Geneva Conventions*<sup>5</sup> still represent the only treaty series that have received universal ratification. However, despite being a single treaty series, they collectively contain literally hundreds of articles of textual regulation of battlespace activity. Combined with scores of other treaties regulating specific means and methods of armed conflict, along with the broad application of accompanying principles of customary international law, there is a tendency to conclude that the law itself has an almost omnipotent capacity to greatly ameliorate violence in the battlespace and to somehow tame the excesses of armed conflict. This conclusion is undoubtedly partly true, but it misses the inevitable indeterminacy, uncertainty and over and under-inclusiveness of rules and standards that comprise this corpus of this law, indeed any law. While the temptation to assume that law has assimilated or even

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<sup>4</sup> Jo Brick, 'The Military Profession: Law, Ethics and the Profession of Arms' in Nathan K Finney and Tyrell O Mayfield (eds), *Redefining the Modern Military: The Intersection of Profession and Ethics* (Naval Institute Press, 2018) 22.

<sup>5</sup> *Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field*, opened for signature 12 August 1949, 75 UNTS 31 (entered into force 21 October 1950); *Geneva Convention for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea*, opened for signature 12 August 1949, 75 UNTS 85 (entered into force 21 October 1950); *Geneva Convention Relative to the Treatment of Prisoners of War*, opened for signature 12 August 1949, 75 UNTS 135 (entered into force 21 October 1950); *Geneva Convention Relative to the Protection of Civilian Persons in Times of War*, opened for signature 12 August 1949, 75 UNTS 287 (entered into force 21 October 1950).

substituted for moral and ethical reasoning is great, such a conclusion is contestable. It is here that the analysis of Brick is the most illuminating. She examines the limits of the law and also the moments where the law may act in opposition to deeper moral judgment. In the latter case, she usefully contrasts the significance of legal compliance in the historic cases of relevant military forces abandoning civilians in Srebrenica and Rwanda, briefly examining the two examples of decision-making by military commanders in terms of reconciling legal obedience against moral conviction. She also draws on these examples to more broadly identify the relationship between professional ethos and legal compliance, observing the necessity of conscious self-reflection in the conduct of decision-making within military operations.

It is this latter point that is most revealing in the analysis that Brick makes. The old Just War theory, which has been decisively supplanted by law's contemporary positivist framework, used to require those engaged in fighting a war to conduct a continued self-assessment of their motivation for engaging in armed conflict. This ensured an internal limiting of excessive force and a set boundary of permissible behaviour driven by deeper registers of legitimacy. This is no longer a mandatory requirement under contemporary requirements of positive law, which merely require a binary assessment of whether a particular action is lawful or not. It is here, though, that self-awareness and an ethical code of behaviour should find their most prominent expression. Brick uses the model of a fiduciary duty owed by the military to the state when acting in the context of armed conflict as a heuristic device to advance this idea. Such a model, whilst not formally applicable, does nonetheless provide a useful basis upon which to conceive of how ethical and moral boundaries can and should inform decision-making under the law in a time of armed conflict. Brick correctly observes that military forces, especially those from liberal democracies, undertake their actions in the name of the populations they represent and accordingly, there is a need for accountability under both legislative and moral codes of behaviour. It is here that professionalism and the professional duties of military forces, who enjoy a monopoly of skill and authority to engage in armed conflict on behalf of the State, are most relevant in providing the means by which these codes of restraint and right behaviour can be informally developed and embraced.

While the law operates as a necessary restraint in ameliorating the excesses of armed conflict, the application of a professional ethos is the added element that completes the sufficient equation and ensures that behaviour in warfare can be effectively bounded. In short, Brick makes a compelling argument for the need to forge a self-aware, ethical reference point when traversing the legal landscape. This raises obvious challenges in terms of education and training (Brick poignantly notes '[t]he law is easy; ethics is hard'<sup>6</sup>) but is a necessary element to underpin the very professionalism that establishes the military's identity and social role in the first place.

The editors Finney and Mayfield are to be congratulated for their attention to the key issue of exploring the relationships between military service, professionalism and ethical orientation. The military occupy a unique legal and social place in their

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<sup>6</sup> Brick (n 4) 34.

capacity to dispense (extensive) lethal force. While much has been invested into the law of armed conflict in the hope that it will sufficiently restrain violence, there is the need for locating deeper registers of ethical duty. This duty finds expression in the recognition of the professional nature of military service and the rights and obligations that flow as a consequence. The approaches taken in this book to examine these issues do a magnificent job of revealing a rich and thoughtful literature of analysis. The book represents a key moment of reflection for all who are interested in understanding issues of restraint, professionalism and ethical boundaries in the conduct of contemporary military operations.

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